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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

## No. 244.

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY OF JACOB M. MERTENS ET AL., BANKRUPTS, APPELLANT,

*vs.*

THE VARICK BANK OF NEW YORK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED APRIL 2, 1906.

(20,167.)

(20,167.)

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a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of JACOB M. MERTENS ET ALS., Bankrupts; THE VARICK BANK OF NEW YORK, Appellant.

*Transcript of Record.*

Appeal from the District Court of the United States for the Northern District of New York.

1 United States District Court for the Northern District of New York.

In the Matter of JACOB M. MERTENS and Others, Bankrupts.

*Statement.*

1904.
Sept. 10.—Proof of claim of Varick Bank of New York against co-partnership estate and individual estate filed.
Nov. 14.—Objection to the allowance of said claims by Trustee filed.
Dec. 1.—Hearing on allowance or disallowance of claims held before Referee.
" 2.—Claims disallowed by Referee.
" 17.—Petition to review Referee's ruling filed.
" 19.—Referee's certificate filed.
1905.
Jan. 17.—Memorandum, Ray, *J.*, on confirmation of Referee's ruling disallowing claims.
" 21.—Order filed approving Referee's ruling disallowing claims.
" 21.—Notice of appeal and allowance thereof filed.
" 21.—Citation issued and filed.
" 21.—Creditors' assignments of errors filed.
—Stipulation waiving certain portions of record on appeal filed.

2 *Original Partnership Proof of Debt.*

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, as Composing the Co-partnership Firm of J. M. Mertens & Co., Bankrupts.

In Bankruptcy. 1527.

At New York City, in the Southern District of New York, on the 9th day of September, A. D. 1904, came Addison H. Day, of the Town of Chatham, in the County of Morris, State of New Jersey,

and made oath and says that he is the cashier of the Varick Bank of New York, a corporation incorporated by and under the laws of the State of New York, and authorized to do business in the City of New York, County and State of New York; that this proof is not made by the treasurer of such corporation for the reason that said corporation has no treasurer and that the affiant is an officer of such corporation and his duties most nearly correspond to those
3 of treasurer, and that he is duly authorized to make this proof; and that the said Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, as composing the firm of J. M. Mertens & Co., against whom a petition for adjudication of bankruptcy has been filed, were at and before the filing of the said petition, and still are, justly and truly indebted to said corporation in the sum of twenty-seven thousand eight hundred ninety-three and 85/100 ($27,893.85) dollars; that the consideration of said debt is as follows:

That heretofore said Varick Bank of New York discounted for the account of said J. M. Mertens & Co., bankrupts above named, and is now the owner and holder for value, of the notes herewith presented, copies of which are hereto annexed and made a part hereof.

That no part of said debt has been paid; that there are no set-offs or counterclaims to the same, except the sum of one hundred seventy-three and 21/100 ($173.21) dollars held by the said Varick Bank of New York, as a general deposit to the credit of J. M. Mertens & Co., bankrupts above named, at the time of the filing of the petition in bankruptcy herein, and the said J. M. Mertens & Co., bankrupts above named, are entitled to a rebate for unearned interest at the time of the filing of the petition in bankruptcy herein in the sum of one hundred fifty-six and 17/100 ($156.17) dollars, leaving due and owing to the said Varick Bank of New York, the sum of twenty-seven thousand five hundred sixty-four and 47/100 ($27,564.47) dollars, and upon which indebtedness no judgment has been rendered; and that the said corporation has not, nor has any person for its order, or to the knowledge or belief of said deponent, for
4 its use, had or received any manner of security for said debt whatever from the said J. M. Mertens & Co.

ADDISON H. DAY. [SEAL.]

Subscribed and sworn to before me, this 9th day of September A. D. 1904.

E. A. DAKIN,
[SEAL.] *Notary Public, Richmond County.*

Certificate filed in New York County.

*Original Individual Proof of Debt.*

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, Individually, Bankrupt.

In Bankruptcy. 1527.

At New York City, in the Southern District of New York, on the 9th day of September, A. D. 1904, came Addison H. Day, of the Town of Chatham, in the County of Morris, State of New Jersey, and made oath and says that he is the cashier of the Varick Bank of New York, a corporation incorporated by and under the laws of the State of New York, and authorized to do business in the City of New York, County and State of New York; that this proof
5 is not made by the treasurer of such corporation for the reason that said corporation has no treasurer and that the affiant is an officer of such corporation and his duties most nearly correspond to those of treasurer, and that he is duly authorized to make this proof; and that the said Jacob M. Mertens against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is, justly and truly indebted to said corporation in the sum of twenty-five thousand four hundred eighty-nine and 62/100 ($25,489.62) dollars; that the consideration of said debt is as follows:

That heretofore the said Varick Bank of New York discounted certain promissory notes in writing, copies of which are hereto annexed and made a part hereof, upon which the said Jacob M. Mertens was either the maker or endorser thereof; all of which said notes were so discounted for value received before maturity and of which said Varick Bank of New York is now the lawful owner and holder thereof.

That no part of said debt has been paid; that there are no set-offs or counterclaims to the same, except the sum of six thousand ($6,000) dollars, held by said Varick Bank of New York on deposit and as collateral security at the time of the filing of the petition herein; and that at the time of the filing of the petition in bankruptcy herein said Varick Bank of New York held as security and collateral, property of said bankrupt which property according to the terms of the agreements under which the same was pledged and previous to the date of adjudication and the appointment or election of a trustee herein, were converted into money and from which said Varick Bank of New York realized the sum of ten thousand
6 two hundred and twenty-one ($10,221) dollars, leaving due and owing to said Varick Bank of New York, the sum of nine thousand one hundred eighteen and 37/100 ($9,118.37) dollars from the said Jacob M. Mertens, and upon which indebtedness no judgment has been rendered.

ADDISON H. DAY. [SEAL.]

Subscribed and sworn to before me, this 9th day of September, A. D. 1904. E. A. DAKIN,
[SEAL.] *Notary Public, Richmond County.*

Certificate filed in New York County.

*Collateral Note and Agreement of Pledge.*

$5,000.00. NEW YORK, N. Y., *April 20th*, 1903.

Four months after date, for value received, the undersigned, jointly and severally promise to pay to the Varick Bank of New York, N. Y., or order, at its Banking Office, 260 West Broadway, N. Y., in funds current through the New York Clearing House, Five Thousand Dollars thereof, as well as for the payment of any other liability or liabilities of the undersigned to the holder of this note, due or to become due, whether now existing or hereafter arising, the following property, viz.:

Insurance Policy No. 417,171 for $50,000.00 in the Equitable Life Assurance Society of New York of a market value estimated by the undersigned at $— and the undersigned agree to deliver
7 to the said holder additional securities to its satisfaction, should the market value of the said securities as a whole, suffer any decline or the Bank at any time deem the securities insufficient, and also hereby give to the said Bank (but to no other holder) a lien for the amount of all the liabilities of the undersigned to it upon all the property or securities given unto or left in the possession of the said Bank by the undersigned and also upon any balance of the deposit account of the undersigned with the said Bank.

On the non-performance of this promise or upon the non-payment of any of the liabilities above mentioned, or upon the failure of the undersigned forthwith, with or without notice, to furnish satisfactory additional securities in case of decline, as aforesaid—then, and in either such case, this note shall forthwith become due and payable, without demand or notice and full power and authority are hereby given to said holder to sell, assign and deliver the whole of the said securities, or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto or left in the possession of the holder by the undersigned, for safe keeping or otherwise, at any Broker's Board or at public or private sale, at the option of the said holder, without either demand, advertisement or notice of any kind, which are hereby expressly waived. At any such sale the said holder may purchase the whole or any part of the property sold, free from any right of redemption on the part of the undersigned, which is hereby waived and released. In case of sale for any cause, after deducting all costs or expenses of every kind for collection, sale or delivery, the said holder may apply the residue of the proceeds of the sale or sales so made, to pay one or more or all of the said liabilities to it or
8 him as to it or him shall seem proper, whether then due or not due, making proper rebate for interest on liabilities not then due, and returning the overplus, if any, to the undersigned, who agree to be and remain liable to the said holder for any de-

ficiency arising upon such sale or sales. The undersigned do hereby authorize and empower the said Bank (but no other holder) at its option, at any time, to appropriate and apply to the payment and extinguishment of any obligations or liabilities of the undersigned to it, whether now existing or hereafter contracted, any and all moneys now or hereafter in the hands of the said Bank, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due.

1010. J. M. MERTENS & CO.

(Endorsed on the back is the following:)

In consideration of one dollar paid to the undersigned, and of the making, at the request of the undersigned, of the loan evidenced by the within note, the undersigned hereby jointly and severally guarantee to the Varick Bank of New York, N. Y., its successors, endorsers or assigns, the punctual payment, at maturity, of the said loan, and hereby assent to all the terms and conditions of the said note and consent that the securities for the said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan extended without notice to or further assent from the undersigned, who will remain bound upon this guaranty, notwithstanding such changes, surrender or extension.

J. M. MERTENS & CO.,
J. M. MERTENS.

Protested for non-payment Aug. 20th, 1903.

9 The debt against the copartnership estate consisted of obligations annexed to the proof of claim of which the following is a transcript:

| Date. | Due. | Maker. | Endorser. | Am't. |
|---|---|---|---|---|
| 5/15/1903 | 8/17/03 | Cole & Spellman ... | J. M. Mertens & Co..... | $280 61 |
| 4/15/1903 | 8/17/03 | do. do. ... | do. ..... | 420 29 |
| 4/20/1903 | 8/20/03 | J. M. Mertens & Co. | J. M. Mertens & Co. and Jacob M. Mertens. | 5,000 00 |
| 4/21/1903 | 8/21/03 | Rochester Clothing Co. | J. M. Mertens & Co. and Jacob M. Mertens. | 612 03 |
| 4/18/1903 | 8/18/03 | G. W. Hydron ..... | J. M. Mertens & Co..... | 491 72 |
| 4/18/1903 | 8/18/03 | do. ..... | do. ..... | 496 31 |
| 4/ 1/1903 | 8/31/03 | Clarence H. Spraker. | do. ..... | 100 00 |
| 7/ 1/1903 | 9/ 1/03 | E. G. Fox & Son.... | J. M. Mertens & Co. and Jacob M. Mertens. | 126 51 |
| 5/ 4/1903 | 9/ 4/03 | J. M. Mertens & Co. | J. M. Mertens & Co. and Jacob M. Mertens. | 5,000 00 |
| 5/ 8/1903 | 9/ 8/03 | J. Warren Bullen .. | J. M. Mertens & Co. and Jacob M. Mertens. | 1,000 00 |
| 7/ 1/1903 | 10/ 1/03 | John S. Hough .... | do. do. .... | 639 05 |
| 6/ 2/1903 | 10/ 2/03 | Rochester Clothing Co. | do. do. ... | 612 03 |
| 7/10/1903 | 11/10/03 | John S. Hough ..... | J. M. Mertens & Co... .. | 612 30 |
| 7/17/1903 | 11/17/03 | J. M. Mertens & Co. | J. M. Mertens & Co. and Jacob M. Mertens. | 5,000 00 |
| 7/20/1903 | 11/20/03 | do. | do. do. | 5,000 00 |
| 8/ 6/1903 | 12/ 7/03 | do. and Jacob M. Mertens. | do. do. and Jennie Mertens. | 2,500 00 |

Of the foregoing obligations representing a part of the claim against both the partnership and individual estates are the following collateral notes all upon the same printed form of contract as that contained in the record.

10 Note dated May 4, 1903, due September 4, 1903, for $5,000 made by J. M. Mertens & Co., and endorsed by J. M. Mertens & Co., and Jacob M. Mertens, depositing as collateral security insurance policy No. 417,171 for $50,000 in the Equitable Life Assurance Society of New York.

Note dated July 17, 1903, due November 17, 1903, for $50,000 made by J. M. Mertens & Co. and endorsed by J. M. Mertens & Co. and Jacob M. Mertens, depositing as collateral security insurance policy No. 417,171 for $50,000 in the Equitable Life Assurance Society of New York.

Note July 20, 1903, due November 20, 1903, made by J. M. Mertens & Co. and endorsed by J. M. Mertens & Co. and Jacob M. Mertens, depositing as collateral security insurance policy No. 252,314 for $10,000 in the Equitable Life Assurance Society of New York.

Note dated August 6, 1903, due December 7, 1903, made by J. M. Mertens & Co. and Jacob M. Mertens and endorsed by J. M. Mertens & Company, Jacob M. Mertens and Jennie Mertens, depositing as collateral security insurance policies No. 417,171 for $50,000, and No. 252,314 for $10,000 in the Equitable Life Assurance Society of New York.

All of the remaining obligations are upon the usual form of promissory notes.

The debt against the individual estate consisted of obligations annexed to the proof of claim of which the following is a transcript:

11

| Date. | Due. | Maker. | Endorser. | Am't. |
|---|---|---|---|---|
| 4/20/1903 | 8/20/03 | J. M. Mertens & Co. | J. M. Mertens & Co. and Jacob M. Mertens. | $5,000 00 |
| 4/21/1903 | 8/21/03 | Rochester Clothing Co. | J. M. Mertens & Co. and Jacob M. Mertens. | 612 03 |
| 7/ 1/1903 | 9/ 1/03 | E. G. Fox & Son.... | J. M. Mertens & Co. and Jacob M. Mertens. | 126 51 |
| 5/ 4/1903 | 9/ 4/03 | J. M. Mertens & Co. | J. M. Mertens & Co. and Jacob M. Mertens. | 5,000 00 |
| 5/ 8/1903 | 9/ 8/03 | J. Warren Bullen... | J. M. Mertens & Co. and Jacob M. Mertens. | 1,000 00 |
| 7/ 1/1903 | 10/ 1/03 | John S. Hough..... | do. do. .... | 639 05 |
| 6/ 2/1903 | 10/ 2/03 | Rochester Clothing Co. | do. do. .... | 612 03 |
| 7/17/1903 | 11/17/03 | J. M. Mertens & Co. | J. M. Mertens & Co. and Jacob M. Mertens. | 5,000 00 |
| 7/20/1903 | 11/20/03 | do. .... | do. do. | 5,000 00 |
| 8/ 6/1903 | 12/ 7/03 | do. and Jacob M. Mertens. | do. do. and Jennie Mertens. | 2,500 00 |

Of the foregoing obligations representing a part of the claim against both the partnership and individual estates are the following collateral notes all upon the same printed form of contract as that contained in the record.

Note dated May 4, 1903; due September 4, 1903; for $5,000 made by J. M. Mertens & Co., and endorsed by J. M. Mertens & Co., and Jacob M. Mertens depositing as collateral security insurance policy No. 417,171 for $50,000 in the Equitable Life Assurance Society of New York.

Noted dated July 17, 1903. due November 17, 1903, for $5,000 made by J. M. Mertens & Co. and endorsed by J. M. Mertens & Co. and Jacob M. Mertens, depositing as collateral security in-
12 surance policy No. 417,171 for $50,000 in the Equitable Life Assurance Society of New York.

Note July 20, 1903, due November 20, 1903, made by J. M. Mertens & Co. and endorsed by J. M. Mertens & Co. and Jacob. M Mertens depositing as collateral security insurance policy No. 252,314 for $10,000 in the Equitable Life Assurance Society of New York.

Note dated August 6, 1903, due December 7, 1903, made by J. M. Mertens & Co. and Jacob M. Mertens and endorsed by J. M. Mertens & Company, Jacob M. Mertens and Jennie Mertens, depositing as collateral security insurance policies No. 417,171 for $50,000 and No. 252,314 for $10,000 in the Equitable Life Assurance Society of New York.

All of the remaining obligations are upon the usual form of promissory notes.

13 *Amended Partnership Proof of Debt.*

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, as Comprising the Copartnership Firm of J. M. Mertens & Co., Bankrupts.

In Bankruptcy. 1527.

At New York City, in the Southern District of New York, on the 30th day of November, 1904, came Addison H. Day, of the Town of Chatham, in the County of Morris, State of New Jersy, and for this an amendment of a proof of debt heretofore filed herein by the Varick Bank of New York makes oath and says:

That he is the cashier of the Varick Bank of New York, a corporation incorporated by and under the laws of the State of New York and authorized to do business in the City of New York, County and State of New York. That this proof is not made by the treasurer of such corporation for the reason that said corporation
14 has no treasurer, and that the affiant is an officer of said corporation and his duties most nearly correspond to those of treasurer and that he is duly authorized to make this proof;

and that the said Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, as composing the firm of J. M. Mertens & Co., against whom a petition for adjudication of bankruptcy has been filed, were at and before the filing of said petition, and still are, justly and truly indebted to the said corporation in the sum of twenty-seven thousand eight hundred and ninety-three and 85/100 ($27,893.85) dollars. That the consideration of said debt is as follows:

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing made by Cole & Spellman, dated May 15, 1903, due the 17th day of August, 1903, and endorsed by the said J. M. Mertens & Co. for the sum of two hundred and eighty and 61/100 ($280.61) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof and for a valuable consideration thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing made by Cole & Spellman, dated April 15, 1903, due the 17th day of August, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of four hundred and twenty and 29/100 ($420.29) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof and for a valuable consideration thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing made by G. W. Hydron, dated April 18, 1903, due August 18, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of four hundred and ninety-four and 72/100 ($494.72) dollars. That the said Varick Bank of New York City duly discounted the said promissory note as aforesaid before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing made by G. W. Hydron, dated April 18, 1903, and due August 18, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of four hundred and ninety-six and 31/100 ($496.31) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of

the said bankrupts, a certain promissory note in writing made by Clarence H. Spraker, dated April 1, 1903, due August 31, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of one hundred ($100) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

16 That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing made by John S. Hough, dated July 10, 1903, due November 10, 1903, and endorsed by the said J. M. Mertens & Co. for the sum of six hundred and twelve and 30/100 ($612.30) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and on or about the 20th day of April, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 20th day of August, 1903, and endorsed by the said Jacob M. Mertens & Co., and Jacob M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 4th day of May, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 4th day of September, 1903, and endorsed by the said J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 17th day of July, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 17th day of

17 November, 1903, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 20th day of July, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 20th day of November, 1903, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 6th day of August, 1903, the said Varick Bank of New York, for a valuable consideration duly

discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 7th day of December, 1903, made and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, and endorsed by Jennie Mertens, for the sum of two thousand five hundred ($2,500), and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 21st day of April, 1903, and due the 21st day of August, 1903, made by the Rochester Clothing Company, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the
18 lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 1st day of July, 1903, and due the 1st day of September, 1903, made by E. G. Fox & Son, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of one hundred and twenty-six and 51/100 ($126.51) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 8th day of May, 1903, and due the 8th day of September, 1903, made by J. Warren Bullen, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of one thousand dollars ($1,000) *dollars*. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 1st day of July, 1903, and due the 1st day of October, 1903, made by John S. Hough, and endorsed by J. M. Mertens & Company and J. M. Mertens, individually, for the sum of six hundred and thirty-nine and 5/100
19 ($639.05) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the

Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 2d day of June, 1903, and due the 2d day of October, 1903, made by the Rochester Clothing Company and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That no part of said debt has been paid by the said J. M. Mertens & Co. That there are no off-sets or counterclaims to the same, except the sum of one hundred and seventy-three and 21/100 ($173.21) dollars, held by the Varick Bank of New York as a general deposit to the credit of J. M. Mertens & Co., bankrupts above named, at the time of the filing of the petition in bankruptcy herein, and the said J. M. Mertens & Co., bankrupts above named, are entitled to a rebate for unearned interest at the time of the filing of the petition in bankruptcy herein in the sum of one hundred and fifty-six and 17/100 ($156.17) dollars, leaving due and owing to the said Varick Bank of New York the sum of twenty-seven thousand five hundred and sixty-four and 47/100 ($27,564.47) dollars, and upon which indebtedness no judgment has been rendered; and that said corporation has not, nor has any person for its order, or to the knowledge or belief of deponent, for its use had or received any manner of security for said debt from the said J. M. Mertens & Co.

That at the time of the filing of the said petition, the said Varick Bank of New York held as collateral security for the payment of the said debt, which said collateral was deposited by J. M. Mertens, individually, the following described property, to wit:

The sum of six thousand ($6,000) dollars cash held on deposit with the Varick Bank of New York for the individual account of J. M. Mertens, a certain policy of insurance upon the life of Jacob M. Mertens, in the Equitable Life Assurance Society of the United States, numbered 417,171 for the sum of fifty thousand ($50,000) dollars and a certain other insurance policy upon the life of Jacob M. Mertens in the said Equitable Life Assurance Society of the United States, numbered 252,314 for the sum of ten thousand ($10,000) dollars.

ADDISON H. DAY, [SEAL.]
*Cashier of Varick Bank of New York.*

Subscribed and sworn to before me, this 30th day of November, 1904.

HENRY J. DORGELOH,
[SEAL.] *Notary Public, Kings Co.*

21 *Amended Individual Proof of Debt.*

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, Individually, Bankrupt.

At New York City, in the Southern District of New York, on the 30th day of November, 1904, came Addison H. Day, of the Town of Chatham, in the County of Morris, State of New Jersey, and for this an amendment of a proof of debt heretofore filed herein by the Varick Bank of New York makes oath and says:

That he is the cashier of the Varick Bank of New York, a corporation incorporated by and under the laws of the State of New York, and authorized to do business in the City of New York, County and State of New York. That this proof is not made by the treasurer of such corporation for the reason that said corporation has no treasurer, and that the affiant is an officer of said corporation and his duties most nearly correspond to those of treasurer and that he is duly authorized to make this proof; and that the said Jacob M. Mertens,

22 against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said croporation in the sum of twenty-five thousand four hundred and eighty-nine and 62/100 ($25,489.62) dollars. That the consideration of said debt is as follows:

That heretofore and on or about the 20th day of April, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 20th day of August, 1903, and endorsed by the said Jacob M. Mertens & Co. and Jacob M. Mertens, individually, for the sum five thousand ($5,000) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and on or about the 4th day of May, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 4th day of September, 1903, and endorsed by the said J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and on or about the 17th day of July, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 17th day of November, 1903, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and on or about the 20th day of July,
23 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 20th day of November, 1903, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 6th day of August, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 7th day of December, 1903, made and endorsed by J. M. Mertens & Co. and J. M. Mertens individually, and endorsed by Jennie Mertens, for the sum of two thousand five hundred ($2,500) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 21st day of April, 1903; and due the 21st day of August, 1903, made by the Rochester Clothing Company, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 1st day of July, 1903, and due the 1st day of September, 1903, made by E. G.
24 Fox & Son, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of one hundred and twenty-six and 51/100 ($126.51) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

There heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 8th day of May, 1903, and due the 8th day of September, 1903, made by J. Warren Bullen, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of one thousand ($1,000) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 1st day of July, 1903,

and due the 1st day of October, 1903, made by John S. Hough, and endorsed by J. M. Mertens & Company and J. M. Mertens, individually, for the sum of six hundred and thirty-inne and 5/100 ($639.05) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

25 That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 2d day of June, 1903, and due the 2d day of October, 1903, made by the Rochester Clothing Company and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That no part of said debt has been paid; that there are no offsets or counterclaims to the same, except the sum of six thousand ($6,000) dollars held by the said Varick Bank of New York on deposit and as collateral security at the time of the filing of the petition herein. That at the time of the filing of the petition in bankruptcy herein, the Varick Bank of New York also held as collateral security, to wit: a certain policy of insurance upon the life of Jacob M. Mertens, in the Equitable Life Assurance Society of the United States, numbered 417,171 for the sum of fifty thousand ($50,000) dollars and a certain other insurance policy upon the life of Jacob M. Mertens in the said Equitable Life Assurance Society of the United States, numbered 252,314 for the sum of ten thousand ($10,000) dollars.

That under and by virtue of the terms of the agreement under which the said policies were deposited as collateral with the said Bank, the said Bank was authorized and empowered by the said bankrupt upon default in the payment of the said debt or any part thereof to sell, assign or otherwise dispose of the said collateral security at public or private sale with or without notice to the

26 said bankrupt as is more particularly specified in the said agreement. That in accordance with the said agreement as aforesaid, the said Varick Bank of New York did, prior to the date of the adjudication herein and subsequent to the date of the filing of the petition, convert the said policies into money in accordance with the terms of the agreement under which the same were deposited realizing therefor the sum of ten thousand two hundred and twenty-one ($10,221) dollars, leaving due and owing to the said Varick Bank of New York the sum of nine thousand one hundred and eighteen and 37/100 ($9,118.37) dollars from the said Jacob M. Mertens and upon which said indebtedness no judgment has been rendered.

ADDISON H. DAY, [SEAL.]
*Cashier of Varick Bank of New York.*

Subscribed and sworn before me, this 30th day of November, 1904.

HENRY J. DORGELOH,
[SEAL.] *Notary Public, Kings Co.*

27 *Objections to Partnership Debt.*

In the District Court of the United States, for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

Albert K. Hiscock, trustee of the estates of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually, and as composing the co-partnership firm of J. M. Mertens & Co., bankrupts, a person interested in said estate, does hereby oppose and object to the allowance of the claim of Varick Bank of New York, heretofore filed herein, in the amount of $27,-564.47 against the estate of Jacob M. Mertens & Company and its assets, and for grounds of such opposition and objection does file the following specifications:

That said proof of claim does not specify the consideration which claimant gave to the said bankrupt firm for the debt therein
28 set forth, and that said claimant held collateral securities for the payment of said indebtedness, which are not itemized and which are not set forth.

Said claim is further objected to on the ground that at the time of filing the petition in bankruptcy herein, said bank held as collateral security for the payment of $15,000 of said indebtedness a policy of life insurance issued upon the life of said Jacob M. Mertens by The Equitable Life Assurance Society of New York, No. 417,171, and that said claimant Bank has not credited the said security upon its said claim and indebtedness and that the value of said security has not been ascertained, as provided by Subdivision H of Section 57 of the Bankruptcy Law.

Said claim is further objected to on the grounds that at the time of the filing of the petition in bankruptcy herein, said Bank held as security for the payment of said indebtedness a policy of life insurance issued upon the life of said Jacob M. Mertens by The Equitable Life Assurance Society of New York, No. 252,314, and that said claimant Bank has not credited the said security upon its said claim and indebtedness and that the value of said security has not been ascertained as provided by Sub-division H of Section 57 of the Bankruptcy Law.

Said claim is further objected to on the ground that said claimant has received payment of a part of the notes set forth in said proof of claim made by Cole & Spellman, and has received payment in part of the notes in said proof of claim set forth made by G. W. Hydron,

and has received payment in full of the note in said proof of claim set forth made by Clarence H. Spraker for $100, and has received payment in full of the note set forth in said proof of claim made by E. G. Fox & Son for $125, and has received payment in part of the
29 notes set forth in said proof of claim made by the Rochester Clothing Company, and has received payment in part of the note set forth in said proof of claim made by J. Warren Bullen, and has received payment in part of the notes set forth in said proof of claim made by John S. Hough, and that said payments on said notes are not credited on said claim, or if they are credited, are not itemized and specified, as required by law.

Said claim is further objected to on the ground that J. M. Mertens & Company were not at the time of the filing of said claim indebted to said Varick Bank in said amount of $27,564.47, but that a part of said claim has been paid.

Said claim is further objected to on the ground that certain payments have been credited thereon by J. M. Mertens, individually, and certain credits should have been made thereon on account of collateral securities furnished to said Bank by Jacob M. Mertens for the payment thereof, which have not been applied and on the ground that this claimant has filed a claim against Jacob M. Mertens, individually, on the same indebtedness in this proceeding, in which claim certain credits are allowed upon the said indebtedness of Jacob M. Mertens, which credits are not allowed upon this claim against J. M. Mertens & Co.

Said claim is further objected to on the ground that whatever securities were held by said Varick Bank for the payment of its said indebtedness were required to be liquidated and the value thereof applied upon said indebtedness within one year from September 15, 1903, the date of the adjudication in bankruptcy herein.

That such claim should not be allowed, as appears upon the face thereof, and for the objections heretofore stated.

30 Wherefore, objection is made to the allowance of said claim and a hearing asked thereon.

ALBERT K. HISCOCK, *Trustee.*

UNITED STATES OF AMERICA,
*Northern District of New York, County of Onondaga:*

I, Albert K. Hiscock, the objecting trustee mentioned and described in the foregoing specifications of objection, do hereby make solemn oath that the statements of fact mentioned therein are true, according to the best of my knowledge, information and belief.

ALBERT K. HISCOCK.

Subscribed and sworn to before me, this 22d day of November, 1904.

PERRY A. WOOD,
*Notary Public, Onon. Co., N. Y.*

31 *Objections to Individual Debt.*

In the District Court of the United States, for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS and EDMUND A. MERTEN-, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

Albert K. Hiscock, trustee of the estates of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually, and as composing the co-partnership firm of J. M. Mertens & Co. bankrupts, a person interested in said estates, does hereby oppose and object to the allowance of the claim of Varick Bank of New York, heretofore filed herein, in the amount of $9,118.37 against the individual estate of Jacob M. Mertens and its assets and for grounds of such opposition and objection does file the following specifications:

That the said proof of claim does not specify the consideration which claimant gave to the said bankrupt for the debt therein
32 set forth, and that said claim does not specify and itemize the securities which the said claimant held or claims to have held for the payment of said indebtedness.

Said claim is further objected to on the ground that at the time of the filing of the petition in bankruptcy herein, said bank held as collateral security for the payment of $15,000 of said indebtedness a policy of life insurance issued upon the life of said Jacob M. Mertens by The Equitable Life Insurance Society of New York, No. 417171, and that said claimant bank has not credited the said security upon its said claim and indebtedness and that the value of said security has not been ascertained as provided by Subdivision H of Section 57 of the Bankruptcy Law.

Said claim is further objected to on the grounds that at the time of the filing of the petition in bankruptcy herein, said bank held as security for the payment of said indebtedness a policy of life insurance issued upon the life of said Jacob M. Mertens by the Equitable Life Assurance Society of New York, No. 252,314, and that said claimant Bank has not credited the said security upon its said claim and indebtedness and that the value of said security has not been ascertained as provided by Subdivision H of Section 57 of the Bankruptcy Law.

Said claim is further objected to on the ground that said claimant has received payment of the note set forth in said proof of claim made by E. G. Fox & Son, for $125 and interest and on the ground that said claimant has received payment in part of the notes in said proof of claim set forth, made by the Rochester Clothing Company, J. Warren Bullen and John S. Hough, and that said payments on said notes are not credited on said claim, or if they are credited, are not itemized and specified, as required by law.

It is also denied, on information and belief, that the said
33 Varick Bank held $6,000 on deposit as collateral security to said indebtedness at the time of the filing of the petition herein.

Said claim is further objected to on the ground that whatever securities were held by said Varick Bank for the payment of its said indebtedness were required to be liquidated and the value thereof applied upon said indebtedness within one year from September 15, 1903, the date of the adjudication in bankruptcy herein.

That such claim should not be allowed, as appears upon the face thereof, and for the objections heretofore stated.

Wherefore, objection is made to the allowance of said claim and a hearing asked thereon.

ALBERT K. HISCOCK, *Trustee.*

UNITED STATES OF AMERICA,
*Northern District of New York, County of Onondaga, ss:*

I, Albert K. Hiscock, the objecting trustee mentioned and described in the foregoing specifications of objection, do hereby make solemn oath that the statements of fact mentioned therein are true, according to the best of my knowledge, information and belief.

ALBERT K. HISCOCK.

Subscribed and sworn to before me, this 22d day of November, 1904.

PERRY A. WOOD,
*Notary Public, Onon. Co., N. Y.*

34 *Record of Proceedings Before Referee and His Ruling.*

In the United States District Court, for the Northern District of New York.

In the Matter of JACOB M. MERTENS and Others.

DECEMBER 1ST, 1904—at 11 a. m.

Hearing before the Referee upon:

1st. Secured claim of the Varick Bank of New York against Jacob M. Mertens, individually, for $9,118.37, the balance alleged to remain unpaid of a former larger claim;

2d. Unsecured claim of the Varick Bank of New York against Jacob M. Mertens and others, as co-partners, for $27,564.47.

Appearances.

Mr. Czaki, of Fried & Czaki, 11-19 William Street, New York City, for the Claimant;

Messrs. Lewis & Crowley, Syracuse, N. Y., for the Trustee.

Adjourned to 2.30 p. m.

35 2.30 p. m.

Amended proofs of claim, verified November 30th, 1904, of the Varick Bank of New York against the co-partnership firm of J. M. Mertens & Company, and J. M. Mertens, individually, are filed by Mr. Czaki, and are received by the Referee without objection from the Trustee, subject to the right of the Trustee to file amended objections to the claims should he think proper, within five days from date, otherwise the original objections stand as objections to the amended claim.

First. It is mutually conceded by the respective parties that prior to or on the 14th day of September, 1903, the Varick Bank gave to its attorneys, Messrs. Fried & Czaki, policies Nos. 417,171 and 252,-314, issued by the Equitable Life Assurance Society upon the life of Jacob M. Mertens.

Second. Likewise conceded, that prior to or on the 14th day of September, 1903, and prior to the sale thereof, Frederick M. Czaki handed said policies to one Samuel Goldsticker, duly licensed auctioneer, with instructions to sell the same at public auction at the New York Real Estate Sales Rooms in the City of New York, Borough of Manhattan, and that on the said 14th day of September, 1903, at 2 p. m. thereof the said policies were offered for sale at said New York Real Estate Sales Rooms, to the highest bidder, by said Samuel Goldsticker, auctioneer.

Third. Likewise conceded, that no notice of said sale was given to any one except said Varick Bank.

Fourth. That on said 14th day of September, 1903, at 2 p. m. thereof, the said policies were offered for sale by said Samuel
36 Goldsticker, auctioneer. That there was only one bid made which was for the sum of $10,250, made by said Czaki, and which bid was made in the name of Herbert M. Delanoie, who was not present at said sale. Said policies were sold separately; policy No. 417,171 was sold for the sum of $7,000, and policy No. 252,314 was sold for the sum of $3,250.

Fifth. That said Varick Bank of New York had instructed said Czaki that should he purchase said policies, to do so in the name of said Delanoie.

Sixth. That said Varick Bank of New York prior to said sale, made its check on the Western National Bank, to its own order for the amount as therein stated, which said check said Varick Bank's cashier cashed in bills, which bills were thereupon handed to said Czaki. Said check is herewith offered and received in evidence (marked Exhibit J).

Seventh. It is likewise conceded that said Czaki gave said money to said auctioneer after the sale of the said policies, and that the auctioneer's fees were $29.

Eighth. Likewise conceded, that after said sale the said auctioneer gave said Czaki his certified check for $10,250 to the order of the Varick Bank, which check was delivered to the said Bank by said Czaki.

Ninth. Likewise conceded, that the papers marked Exhibits A, B, C and D are copies of the originals, and are received in evidence

with the same force and effect as though originals, said exhibits being the bills of sale executed respectively by the Varick Bank of New York, and Samuel Goldsticker, auctioneer, upon the sale of
37 the said policies.

Tenth. Likewise conceded, that on September 17th, or thereabouts, said Herbert M. Delanoie received said assignments and policies and obtained a loan thereon from the Knickerbocker Trust Company of $10,250, which amount on that day said Delanoie delivered to the Varick Bank.

Eleventh. Likewise conceded, that said policies were bid in for said Varick Bank at said sale, and that whatever title was acquired at said sale by said Delanoie was taken for it, and that said Delanoie ever since has and still holds said policies for said Varick Bank subject to the rights of the Knickerbocker Trust Company therein, to the extent of said loan for $10,250, and the further sum of $2,622.75 since loaned thereon with interest.

Twelfth. Likewise conceded that Exhibits E and F are copies of assignments relating to said policies which were delivered to said Bank at or about the times of their respective dates, which copies may be received in evidence with the same force and effect as the originals thereof, being assignments on the blank forms furnished by the Equitable Life Assurance Society.

Thirteenth. It is conceded that during the years 1901 and a portion of 1902, J. Maus Schermerhorn was the President of the Varick Bank of New York, and he was immediately succeeded by John T. Sproull as President of said bank. There has since been no other president.

Fourteenth. That on August 19th, 1903, said Varick Bank had actual notice that a receiver in bankruptcy of J. M. Mertens
38 & Company and of its individual members had been appointed.

Mr. CZAKI: I ask the Court to allow the claims of the Varick Bank of New York as filed upon the records and documents in evidence.

Mr. CROWLEY: I move for the disallowance of both of the claims on the ground that the claims have not been properly proved; that the value of the securities set forth in the claims has not been proved and no evidence from which that value can be ascertained and found by the Court has been given so as to establish the balance.

Adjourned to December 2nd, at 10 a. m.

DECEMBER, 2ND, 1904, 10 a. m.

Same Appearances.

Fifteenth. It is likewise mutually conceded that Exhibits G and H offered in evidence and received, are correct copies of the originals, and are received with the same force and effect as though originals, being policies No. 417,171, Exhibit G, and policy No. 252,314, Exhibit H.

Sixteenth. It is likewise mutually conceded that Exhibit I is a correct copy of an assignment of policy No. 252,314, executed by Jennie

Mertens and others, which was delivered to said bank at or about the time of its date, and is received in evidence.

Mr. CZAKI: The attorney for the creditors requests to know of the attorney for the trustee whether he rests his case under the objections as filed.

Mr. CZAKI: I move that the Referee decide that the burden
39 of proof in the proceedings is upon the trustee, not having received any response to my question as to whether he had rested.

The REFEREE: I think that the transaction of September 14th, through the auctioneer, consum-ated in the bills of sale referred to in the 9th concession, under all the concessions made, was not such a sale of the insurance policies or either of them, as would have barred the right of the bankrupt under the assignments of the policies, Exhibits E and F read in connection with the agreements made upon the notes, the contents of which are showin in the proofs of claim, to redeem the same upon payment of his indebtedness secured thereby. I do not think that the sale was a public sale in any fair interpretation of that phrase. It appears that the policies are still held for the Varick Bank, and the transaction appears to me upon all the concessions here, to have no more significance than it would have had the Varick Bank, in form and with knowledge of the fact that bankruptcy proceedings were pending against its creditor, in which a receiver has been appointed, executed to itself, an absolute assignment of title to the policies. The trustee insists that the policies and each of them, have in fact, a larger commercial value than the amount proposed to be credited by the Varick Bank upon its claims secured thereby. Such a claim appears to be justified by the terms of the policies themselves. Whatever may be true with respect to the right of the bankrupt or of the trustee to redeem the policies, and whether or not any such right exists, need not be now determined. The creditor, the Varick Bank, is now in this Court still holding these policies, acquired in connection with certain loans, and seeking the aid of this Court in the collection of the balance of its claims which shall not be paid in full out of these policies. Before the creditor is entitled to that relief from this Court, it should satisfy
40 this Court that the full value of the security held by it has been credited or will be, upon the total amount of its claims to which the same applies. I am not satisfied that such full value has been applied by or through the transaction shown as the disposition of the policies in form of a sale to Mr. Delanoie. As the claim against the co-partnership includes the notes set out in the claim against J. M. Mertens individually, I will reserve the question as to the allowance against the co-partnership for a subsequent determination.

As the proof now stands, I shall, therefore, decline to allow either claim as established against the estate or estates. The claimant may, however, if it so wishes, offer further evidence with the view of establishing the value of the policies referred to which should be credited or allowed upon its claims against the bankrupt estates.

Mr. CZAKI: Then, as I understand it, we have the right to intro-

duce further evidence upon either of these claims, if we so desire, and that your Honor's decision is without prejudice to that right?

The REFEREE: Yes, you may proceed with any further evidence upon the subject, without prejudice to your right to review this decision as a preliminary question.

The REFEREE: The claimant may have a certificate of review of my decision.

Mr. CROWLEY: I think at this time I ought to make a motion that the Court, under Subdivision H of 57, direct a method in which this security be liquidated, and that in so doing, he direct the creditor to resell the policies upon notice to the trustee.

Mr. CZAKI: I object to the motion; not a proper part of the present proceeding; that the Court is without power or jurisdiction to grant the motion or consider it; that it calls for the deprivation of the property of the Varick Bank of New York under the terms of the contract and the proceedings which they have taken in pursuance of that contract, and depriving them of their property without due process of law. That no notice of this motion has been given to the Varick Bank or to its attorneys, and that it is not made in accordance with the practice, or rules or provisions of the Act of Congress relating to bankruptcy.

41

The REFEREE: I will reserve my decision upon the motion of the trustee until counsel for the claimant shall conclude as to a review of this decision.

Adjourned to Monday, December 19th, at 11 a. m.

MONDAY, *December* 19, 1904—11 a. m.

By the REFEREE:

I will grant the motion made by the attorney for the trustee. It appears to me that a proper method of liquidation in this case would be for the creditor to make a public sale of the policies he holds upon notice to the Trustee sufficient so that the trustee in turn may notify the creditors. The sale should be upon notice to all parties appearing to have any interest in the policies, including the Insurance Company itself. If counsel fail to agree upon a proper time and place for such a sale, I will appoint such time and place upon application of either party on five days' notice to the other. An order may be entered accordingly, and an exception noted to this ruling and to the order in favor of the Varick Bank, the creditor.

42 *Opinion of District Judge Affirming Referee's Ruling.*

In the District Court of the United States, Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, EDMUND A. MERTENS, and ERNEST T. MERTENS, Individually and as Co-partners, Composing the Firm of "J. M. Mertens & Co.," Bankrupts.

This is the review of orders of C. L. Stone, Esq., Referee in Bankruptcy, refusing to allow two certain amended claims presented by the Varick Bank of the City of New York, one for $27,564.47 against the firm or co-partnership of J. M. Mertens & Co., and the other for $9,118.37 against J. M. Mertens, a member of said co-partnership, individually. The claim of said bank against the firm is founded in the main on the notes of said Company indorsed by said J. M. Mertens, and notes given to said firm by different parties and indorsed by the firm and said J. M. Mertens (second indorser), all discounted at said Varick Bank by said firm. The claim
43 against J. M. Mertens individually is founded on his liability on said indorsements and his liability as signer of one or more of the notes as maker with the company.

The bank held certain collateral which it claims to have converted into cash and applied to the payment of the claim against J. M. Mertens. Six thousand dollars of this collateral was a deposit in said Varick Bank standing to the credit of J. M. Mertens individually. The balance of the collateral consisted of two life insurance policies upon the life of said J. M. Mertens, one for $50,000 and the other for $10,000. The Bank claims that it lawfully disposed of such policies for $10,221.00 pursuant to the contract under which held and applied the proceeds, with such deposit of $6,000.00, on the claim against said J. M. Mertens (asserting that he owned and pledged the collateral) and that they may prove and have allowed the debt arising on these notes to the full amount against the firm or co-partnership, and for the full amount less such credits ($6,000.-00 and $10,221.00 against the indorser, J. M. Mertens.

Objections having been filed by the trustee to the allowance of each claim, mainly on the ground that the value of such collateral had not been properly ascertained or credited; that the value of the policies has not been ascertained as provided by Subdivision H, Section 57 of the Bankruptcy Act, the Referee disallowed both claims as matters stand and made an order prescribing a method for ascertaining the value of such policies.

Fried & Czaki, for claimant, Varick Bank.
Lewis & Crowley, for the Trustee.

RAY, *District Judge:*

It is insisted by the Varick Bank that the policies of insurance were the property of J. M. Mertens individually, the co-partnership

having no interest therein, and that, hence, the claim against
44 J. M. Mertens & Co. was not a secured claim.

The trouble with this contention is the — amended claim does not so show or state, and in one note at least the policies are pledged in writing by the firm as well as by J. M. Mertens as owner. As such policies were assignable this Court will not assume they were owned solely by J. M. Mertens individually.

By Subdivision 23 of Section 1 of the Act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, it is provided:

"'Secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets."

It does not appear and this Court will not assume that the firm did not own at least an interest in these policies when upon the face of one of the notes as it appears that the company pledged them as security for one of the notes in question.

If the Varick Bank relies upon the assignments, made by Jacob M. Mertens and Jacob M. Mertens and wife, of the policies in question, then we find in such assignments no agreement for the sale of such policies in the mode and manner they were disposed of by the Bank. But however this may be, it is evident to the Court that the Referee was correct in refusing to allow these claims. Between the date of the filing of the petition and the date of the adjudication the Varick Bank, without notice to any one, delivered these policies to one of its agents or attorneys with instructions to sell the
45 same at public auction at the New York Real Estate Sales Rooms in the City of New York, and on the same day that said policies were thus delivered to the attorney or agent, the designated attorney offered said policies for sale at said place to the highest bidder. No notice of said proposed sale was given to any person except the Bank and as it was doing the selling no notice to the Bank was required. Only one bid was made, which was for the sum of $10,350.00, made by an attorney for the Bank in the name of another representative of the Bank, and payment was made to the auctioneer by this purchaser with money furnished by the Varick Bank prior to his going to the sales rooms, and strange to say, the Bank had furnished the attorney the exact amount of money for which the policies were sold. This attorney of the Bank took the policies into his possession, but it is conceded that he was acting for the Bank, used the money of the Bank to pay for the policies and thenceforth held the policies for the Bank, except that he procured a loan of the Knickerbocker Trust Company upon the strength of said policies for $10,250.00 and subsequently for the further sum of $2,622.75. The loan procured of the Knickerbocker Trust Company for $10,250.00 was delivered to the Varick Bank and was evidently procured for that Bank. I find no statement as to what was done with the $2,622.75 since loaned on the strength of said policies by the Knickerbocker Trust Company.

It is evident that the Varick Bank, on learning of the filing of the petition in bankruptcy, took advantage of the situation to get possession of these policies as owner without making a fair, honest, open public sale, if it purposed to sell at public sale, and without any attempt to make a fair, honest private sale of the policies. The Bank made no effort whatever to ascertain the true value of these policies. It did not attempt to sell them to any per-
46 son at private sale. It purported to sell at public auction. There is no pretence that at this sale made at the Real Estate Sales Rooms any information was given to the bystanders, if any there were, as to the age or situation of the insured or the nature or character of the policies. It does not appear that even the amount was stated. A public sale under the agreement contained in the notes presupposes a fair, honest public sale; a sale under such conditions that persons present who might desire to purchase would have some understanding of the nature or character and value of the property offered. There was no bidder except the Varick Bank, and it took the policies at the precise sum it had handed its attorney when the direction was given for the sale to be made. This Court has no hesitancy in declaring this transaction fraudulent. The purpose of the Bank in carrying through this sham sale was to get possession of these policies as absolute owner at its own price, if possible, under the pretence of a sale, the effect of which would be to defraud the creditors of the bankrupts, J. M. Mertens and J. M. Mertens & Co. Such a transaction ought not to be sanctioned, and this Court refuses to sanction or approve it. The Referee states, in substance, that the transaction was the same as if the Varick Bank had said we will take these policies at a certain sum of money and credit that sum on the indebtedness. This is putting the case mildly. While it is true that it was a fixing of the sum by the Bank that the Bank was willing to credit on the indebtedness for the policies, which would have been an honest transaction even if not a legal sale of the policies or a compliance with the terms of the agreement under which held, the transaction as it actually occurred was more than that and was intended to be more. It was intended to be a mere formal compliance with the terms of the agreement under
47 which the policies were pledged as collateral security without being in fact a compliance therewith. The intent and purpose was to transfer the absolute title to the Bank and cut off all right of redemption without notice to any of the interested parties under the mere form and pretence of a public sale. The Bank knew and the attorneys conducting the proceedings must have known that the transaction did not measure the value of the policies by a public sale thereof. This transaction did not constitute a compliance with the terms of the agreement under which the Bank held the policies as collateral.

There is still another view to be taken of this transaction. As between the Bank and J. M. Mertens it is conceded that the Bank was a secured creditor. Subdivision H of Section 57 of the Bankruptcy Act provides:

"The value of securities held by secured creditors shall be de-

termined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the Court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

It is evident that the Act contemplates a determination of the value of securities held by secured creditors in one of two ways—either by converting the same into money according to the terms of the agreement, pursuant to which such securities were delivered to such creditors, or by the joint action of the creditors and trustee, pursuant to an agreement, arbitration, compromise or litigation entered into by them, and that the Court may direct the ascertainment
48 of the value of such securities in either manner. It does not lie with the secured creditors to dispose of the securities to himself at a price fixed by himself under the pretence of a sale, public or private, and then say the value has been fixed by a public or private sale to himself, and the Court has nothing further to say regarding the transaction. The Court thinks the Bank is in error and that the Referee was right and that the Court has power to direct the determination of the valuation of these policies by either a public or private sale under such circumstances, and after such inquiry and notice as shall guarantee, to some extent at least, that a fair valuation has been arrived at.

This pretended sale took place between the filing of the petition and the date of the adjudication. The filing of a petition in bankruptcy is a *caveat* to all the world and operates as an attachment and an injunction. From the filing of the petition unto the adjudication the property rights of the debtor are in abeyance.

Bank *v.* Sherman, 101 U. S., 406.
Mueller *v.* Nugent, 184 U. S., 1.

Suits against a bankrupt, if founded on a claim from which a discharge would be a release, are to be stayed until after the adjudication, and in Bank *v.* Sherman, *supra,* the Court said:

The filing of the petition was a *caveat* to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. * * * Those who dealt with his property in the interval between the filing of the petition and the final adjudication, did so at their peril."

49 The provisions in the notes giving the Bank the right to sell at public or private sale without notice, &c., were intended to furnish a remedy to the Bank. Without impairing the obligation of the contract it was perfectly competent for the act to suspend the exercise or enforcement of these remedies until after the adjudication. The act has done this and hence these acts of the Varick Bank, constituting the pretended sale of the policies in question, were in violation of the act and void. Conceding, for the sake of argument, that the Bank might sell at public or private sale after adjudication, even without notice, it could not so sell before adjudication.

In the opinion of the Court the exercise of the power of sale by the Bank was and is subject to the supervision and control of the Court. While it would not deprive the Bank of its right to have the value of these policies determined under the provisions of the contract, it has the power and should see to it that the Bank exercises those powers honestly, fairly, justly and in such a manner as to honestly determine with reasonable certainty the actual value of the securities in question.

The orders of the Referee disallowing the claims are approved and affirmed.

50 *Order Appealed From.*

At a Stated Term of the District Court of the United States, for the Northern District of New York, held at the Court House in the City of Utica on the 21st day of January, 1905.

Present—Honorable George W. Ray, Judge.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, EDMUND A. MERTENS, and ERNEST T. MERTENS, Individually and as Copartners, Composing the Firm of "J. M. Mertens & Co.," Bankrupts.

A petition having been filed herein by the Varick Bank of New York, verified the 12th day of December, 1904, praying that the rulings of Charles L. Stone, Esq., Referee, made herein on the 2nd day of December, 1904, be reviewed by this Court for reasons of error in law and in fact, and due notice of the hearing upon said petition for review having been duly given, now, upon all the proceedings had herein, the claims and amendments thereto filed by the Varick Bank of New York, the objections to the said claims filed by the Trustee, the proceedings had before the said Referee on
51 the 1st and 2nd days of December, 1904, the said petition for review, the evidence and several exhibits therein referred to, taken before the said Referee, all duly certified by the said Referee to this Court;

After hearing Frederick M. Czaki, of counsel for the Varick Bank of New York, claimant, in support of the petition of review that the ruling of the said Referee be vacated, set aside and the claims of the said Bank allowed as filed, and Messrs. Lewis & Crowley, of counsel for the Trustee, in opposition thereto, and due deliberation having been had, it is

Ordered, that the ruling of the said Referee rendered herein on the 2nd day of December, 1904, be and the same hereby is, in all respects and things, approved and affirmed; and it is

Further ordered, that the said Varick Bank of New York may review this order by certiorari or appeal, without prejudice to the right of the said Varick Bank of New York to introduce such further and other evidence as it may be advised before the said Referee.

Dated this 21st day of January, 1905.

GEORGE W. RAY,
*U. S. Judge.*

52 *Notice of Appeal.*

In the District Court of the United States, for the Northern District of New York.

In the Matter of JACOB M. MERTENS ET AL., Bankrupts; THE VARICK BANK OF NEW YORK, a Creditor, Appellant, and ALBERT K. HISCOCK, Trustee, Appellee.

SIRS: You will please take notice that the Varick Bank of New York, a creditor of the above-named bankrupts, conceiving itself aggrieved by the order made and entered in the above-entitled proceeding on the 21st day of January, 1905, hereby appeals from so much of the said order as in all respects and things affirms the ruling of Charles L. Stone, Esq., Referee, refusing to allow the claims of the Varick Bank of New York as filed against the estates of the above-named bankrupts, for the reasons and upon the grounds more particularly specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which the said
53 order was made, duly authenticated, may be filed and sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, January 21st, 1905.

Yours, etc.,

MESSRS. FRIED & CZAKI,
*Solicitors for the Varick Bank of New York, Creditor.*

Office and Post Office Address, 11 William Street, Borough of Manhattan, New York City.

To Messrs. Lewis & Crowley, Solicitors for Albert K. Hiscock, Esq., Trustee, White Memorial Building, Syracuse, New York. William S. Doolittle, Clerk of the District Court of the United States for the Northern District of New York.

The foregoing appeal is allowed.

Dated New York, January 21st, 1905.

GEO. W. RAY,
*Judge of the District Court of the United States for the Northern District of New York.*

54 *Citation.*

In the District Court of the United States, for the Northern District of New York.

In the Matter of JACOB M. MERTENS ET AL., Bankrupts.

In Bankruptcy.

UNITED STATES OF AMERICA, *ss:*

To Albert K. Hiscock, Trustee:

Your are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Second Circuit, to be held in the Federal Court House, in the Post Office Building, in the City of New York, Borough of Manhattan, on the 23d day of February, 1905, pursuant to an appeal from the District Court of the United States for the Northern District of New York, wherein the Varick Bank of New York, a creditor of the above-named bankrupts, is the appellant, and you are the appellee, to show cause, if any there be, why the order passed against the said Varick Bank of New York, as a creditor as aforesaid, should not be reversed and speedy justice done to the parties in its behalf.

Witness: Honorable George W. Ray, Judge of the United States
55 District Court for the Northern District of New York, at the Court House, in the Post Office Building, in the City of Utica, State of New York, on the 21st day of January, in the year of our Lord one thousand nine hundred and five.

GEO. W. RAY,
*District Judge.*

Service of the foregoing citation is hereby admitted.
Dated New York, January — 1905.

____ ____,
*Solicitors for Appellee.*

*Assignments of Error.*

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS ET AL., Bankrupts; VARICK BANK OF NEW YORK, a Creditor, Appellant; ALBERT K. HISCOCK, Trustee, Appellee.

And now comes the Varick Bank of New York, a creditor of the above-named bankrupts, by its solicitors, Messrs. Fried & Czaki, and says and avers:

That the order made and entered in this cause on the —
56 day of January, 1905, is an erroneous one, and against its rights as a creditor, and in violation of the provisions of the Acts of Congress relating to bankruptcy, in this, to wit:

First. That the District Court of the United States, for the Northern District of New York, erred in refusing to allow the claims filed by the Varick Bank of New York against the estate of Jacob M. Mertens, individually, and against the estate of J. M. Mertens & Company, in ruling that the said appellant did not, by the presentation of the said claims and the testimony taken in reference thereto, establish its right to the allowance of said claims as filed.

Second. That the District Court of the United States, for the Northern District of New York, did further err in refusing to allow the claim against the co-partnership estate of J. M. Mertens & Company as filed, in that the said claim was proved as an unsecured claim. That it did appear from all of the proofs and proceedings had that the security held by the said appellant was not property of the bankrupt estate of J. M. Mertens & Company, or such property of the bankrupt estate of J. M. Mertens & Company as is within the purview of the Acts of Congress relating to bankruptcy; and in ruling that it did not affirmatively appear that the said property so held by the said appellant was the property of Jacob M. Mertens individually.

Third. That the United States District Court, for the Northern District of New York, did further err, in that it refused to allow the claim of the appellant filed against the individual estate of Jacob M. Mertens, ruling that the sale of the securities, as disclosed by the proceedings had herein, did not bar the right of redemption
57 of the said Jacob M. Mertens in and to the said securities, and that the value of the said securities was not ascertained as provided by the provisions of Section 57, Sub-division *h*, of the Acts of Congress relating to bankruptcy.

Fourth. That the said District Court of the United States, for the Northern District of New York, did further err, in that it refused to allow the claims filed by the appellant, against the estates of the bankrupts above named, ruling that the sale of the said securities by the said appellant, in the manner as disclosed by the record of the proceedings herein, was not a valid exercise of the power granted by the said Jacob M. Mertens, in the agreements under which the same were pledged, and did not bar the said Jacob M. Mertens' right of redemption in and to the said securities so held by the said appellant.

Fifth. That the said District Court of the United States, for the Northern District of New York, did further err in refusing to allow the claims of the said appellant filed against the estates of the bankrupts above named, in that it did, contrary to the provisions of the Acts of Congress relating to bankruptcy, and contrary to the settled law of the land, hold that the said appellant was without power or right to do any act or thing in pursuance of the terms of the contracts under which the said securities were pledged to it, by reason of the fact that a petition in bankruptcy had been filed and a receiver appointed by the said District Court prior to the disposition of said securities by the said appellant, and that the said appellee, by virtue of his subsequent appointment and qualification as Trustee, became vested, by operation of law or otherwise, with greater
58 rights in and to the said securities than were possessed by the bankrupt, Jacob M. Mertens, as of the date he was adjudicated a bankrupt.

Sixth. That the said District Court of the United States, for the Northern District of New York, did further err, in that it did refuse to allow the claims of the said appellant against the estates of the bankrupts above named, holding that the sale and disposition of the said securities in the manner and upon the facts as disclosed by the record of the proceedings had before the Referee was fraudulent, that the sale thereof was a sham, and for the purpose of defrauding the creditors of the said bankrupts.

Seventh. That the said District Court of the United States, for the Northern District of New York, did further err, in that it did refuse to allow the claims against the estates of the bankrupts above named, ruling that the sale and disposition of the said securities, as disclosed by the record herein, was a mere formal compliance with the terms of the agreements under which the said securities were pledged, without in fact being a compliance therewith; that the said sale and disposition of the said securities, as aforesaid, did not establish and measure the value of the said securities, and that the value of the said securities was not ascertained in accordance with the terms and provisions of the agreements under which they were pledged to the appellant.

Eighth. That the said District Court of the United States, for the Northern District of New York, did further err, in that it did refuse to allow the claims of the said appellant against the estates of the said bankrupts, ruling that the filing of the petition in bankruptcy
59 was tantamount to an injunction and restrained and enjoined the said appellant from in any manner disposing of the said securities until the final adjudication in said bankruptcy proceedings; that the sale and disposition of the said securities, as disclosed by the record of the proceedings herein, was in violation of the right of the appellee, and in violation of the terms and provisions of the Acts of Congress relating to bankruptcy, and in that whatever rights were acquired by the said appellant, under and by virtue of the terms and provisions of the agreements under which the said securities were pledged to it, were suspended, not enforceable, and held in abeyance by virtue of the filing of the petition in bankruptcy and the appointment of said appellee.

Wherefore, for these and divers other good and sufficient reasons, too numerous to be specified, said appellee prays that the said order may be reversed, and that the said claims of the said appellant as filed be allowed, and the District Court, for the Northern District of New York, be directed to allow said claims as filed; and that the said appellant may have such other and further relief as to this Honorable Court may in good conscience seem just and proper.

Dated New York, January 21st, 1905.

FRIED & CZAKI,
*Solicitors for Appellant.*

Office and P. O. Address, 11-19 William Street, New York City, Borough of Manhattan.

60 EXHIBIT A.

Bill of sale by Varick Bank of New York to Herbert M. Delanoie of all the right, title and interest of Jacob M. Mertens and of the Varick Bank of New York in and to policy No. 417171 in the Equitable Life Assurance Society of the United States for the sum of $50,000. Recites that said policy was sold by Samuel Goldsticker, auctioneer, at public sale to the highest bidder at the New York Real Estate Salesrooms for -7,000.00 on September 14, 1903. Bill of sale dated September 17, 1903, and acknowledged same day.

EXHIBIT B.

Bill of Sale by Samuel Goldsticker, auctioneer, to Herbert M. Delanoie of all the right, title and interest of Jacob M. Mertens and of the Varick Bank of New York in and to policy No. 417171 in the Equitable Life Assurance Society of the United States for the sum of $50,000. Recites that said policy was sold at public auction to the highest bidder at the New York Real Estate Sales Rooms September 14, 1903, for $7,000.00. Bill of sale dated September 16, 1903, and acknowledged same day.

EXHIBIT C.

Bill of Sale by Varick Bank of New York to Herbert M. Delanoie of all the right, title and interest of Jacob M. Mertens and of the Varick Bank of New York in and to policy No. 252314 in
61 the Equitable Life Assurance Society of the United States for the sum of $10,000. Recites that said policy was sold by Samuel Goldsticker, auctioneer, at public auction to the highest bidder at the New York Real Estate Salesrooms for $3,250, on September 14, 1903. Bill of sale dated September 17, 1903, and acknowledged same day.

EXHIBIT D.

Bill of sale by Samuel Goldsticker, auctioneer, to Herbert M. Delanoie of all the right, title and interest of Jacob M. Mertens and of the Varick Bank of New York in and to policy No. 252314 in the Equitable Life Assurance Society of the United States for the sum of $10,000. Recites that said policy was sold at public auction to the highest bidder at the New York Real Estate Sales Rooms, September 14, 1903, for $3,250.00. Bill of sale dated September 16, 1903, and acknowledged same day.

## EXHIBIT E.

*Form for Assignment of Policy as Collateral Security.*

To be attached to and retained with the policy for use as evidence when required.

For and in consideration of the sum of One Dollar to me in hand paid by Varick Bank of New York, whose P. O. Address is 260 West Broadway, New York, the receipt whereof is hereby acknowledged, and for securing the money hereinafter mentioned, I hereby sell, assign, transfer and set over unto the said Varick Bank of New
York, Policy No. 417171, issued by The Equitable Life As-
62 surance Society of the United States, on the life of Jacob M.
Mertens, of Syracuse, N. Y., with all right, title and interest therein, together with all moneys which may be now due or hereafter payable thereunder and all dividends, benefits, options and advantages to be derived therefrom, including the right to surrender said policy and to receive the surrender value thereof, accounting to the assignor for any surplus which may be realized over and above the amount due upon said loan.

And for the above consideration I do also for my executors and administrators guarantee the validity and sufficiency of the foregoing transfer and pledge of said policy to said assignee, executors, administrators or assigns; and their title thereto will forever warrant and defend.

Upon condition that this assignment shall be void, and the interest of the assignee released, upon the repayment of the sum of Fifteen Thousand Dollars to the said Varick Bank of New York, to secure which this pledge is made, and after notice of such repayment is given to said Society in writing.

In witness whereof, I have hereunto set my hand and seal this twenty-first day of March, 1901.

JACOB M. MERTENS.

In presence of,
K. L. O'REILLY.

STATE OF NEW YORK, *County of Onondaga:*

On this twenty-first day of March, in the year of our Lord 1901, before me personally came Jacob M. Mertens, to me known and known to me to be the individual described in and who executed
the foregoing assignment, and acknowledged that he exe-
63 cuted the same.

PERRY A. WOOD,
*Notary Public, Onon. Co., N. Y.*

MARCH 22D, 1901.

Received from George H. Dallon, policy 417171 for $50,000, on life of J. M. Martens, in Equitable Life Assurance Co., of New York, together with receipts to Feb'y 15/00 and the assignments and re-

leases to date, including the last assignment under date of March 21st, 01, to Varick Bank of New York, which assignment is now in force.

VARICK BANK OF NEW YORK.
J. MAUS SCHERMERHORN,
*President.*

EXHIBIT F.

*Form for Assignment of Policy as Collateral Security.*

To be attached to and retained with the policy for use as evidence when required.

For and in consideration of the sum of One Dollar to me in hand paid, by the Varick Bank of New York, whose P. O. address is 260 West Broadway, the receipt whereof is hereby acknowledged, and for securing the money hereinafter mentioned, I hereby sell, assign, transfer and set over unto the said Varick Bank of New York, Policy No. 252314 issued by The Equitable Life Assurance Society of the United States, on the life of Jacob M. Mertens, with all right, title and interest therein, together with all moneys which may be
64 now due or hereafter payable thereunder and all dividends, benefits, options and advantages to be derived therefrom, including the right to surrender said policy and to receive the surrender value thereof, accounting to the assignor for any surplus which may be realized over and above the amount due upon said loan.

And for the above consideration I do also for my executors and administrators, guarantee the validity and sufficiency of the foregoing transfer and pledge of said policy to said assignee, my executors, administrators or asigns; and their title thereto will forever warrant and defend.

Upon condition that this assignment shall be void, and the interest of assignee released, upon the repayment of the sum of Five Thousand Dollars to the said Varick Bank of New York, to secure which this pledge is made, and after notice of such repayment is given to said Society in writing.

In witness whereof I have hereunto set my hand and seal, this twenty-fifth day of March, 1901.

JENNIE MERTENS.

In the presence of
JACOB M. MERTENS.

STATE OF NEW YORK, *County of Onondaga:*

On this twenty-fifth day of March in the year of our Lord 1901, before me personally came Jennie Mertens, to me known and known to me to be the individual described in and who executed the foregoing assignment, and acknowledged that she executed the same.

MARCUS B. RATHBUN,
*Notary Public.*

65 EXHIBIT G.

The Equitable Life Assurance Society of the United States.

| Premium. | Amount. |
|---|---|
| $1,735.00. | $50,000. |
| Age 42. | No. 417171. |

(Copy.)

120 Broadway, New York.

President:
Henry B. Hyde.
George W. Phillips, Actuary.
J. G. Van Cise, Assistant-Actuary.
S. D. Ripley, Cashier.
William Alexander, Secretary.
Thomas D. Jordan, Assistant-Secretary.
Edward A. Pearson, 2d Assistant Sec'y.
James B. Loring, Registrar.
James W. Alexander, Vice-President.
Samuel Borrowe, Second Vice-President.
Edward W. Scott, Third Vice-President.

In Consideration of the Application fot this Policy of Insurance, and of each of the statements made therein; And in further consideration of the payment of the sum of seventeen hundred and thirty-five dollars and —— cents, at the office of the Society in the Ctiy of New York, at the date hereof, and of the annual payment of seventeen hundred and thirty-five dollars and —— cents, to be made at the said office, on or before the fifteenth day of February, in every year, during the continuance of this contract:

Does Promise to Pay to Jacob M. Mertens, his executors, administrators or assigns, the sum of Fifty Thousand dollars, (any indebtedness to the Society on account of this contract to be first deducted therefrom), at the Office of the Society, in the City of New
66 York, within sixty days after satisfactory proofs of the death of said Jacob M. Mertens of Syracuse in the County of Onondaga, State of New York, shall have been furninshed to the Society at its said office.

And the said Society does hereby further Promise and Agree that after two years from the date hereof, the only conditions which shall be binding upon the holder of this Policy are that he shall pay the premiums, at the times and place, and in the manner herein stipulated, and that the regulations of the Society as to age and service in war shall be observed, and that in all other respects, if the Policy matures after the expiration of said two years, this Policy shall be indisputable.

And further, that if premiums upon this Policy, for not less than three complete years of assurance, shall have been duly received by said Society, and this Policy should thereafter become void in con-

sequence of default in payment of a subsequent premium, said Society will issue in lieu of such Policy, a new paid up Policy, without participation in profits in favor of said Jacob M. Mertens, his executors, administrators, or assigns, for the entire amount which the full reserve on this Policy, according to the present legal standard of the State of New York, will then purchase as a single premium, calculated by the regular table for single premium policies, now published by the Society; provided, however, that this Policy shall be surrendered duly receipted within six months of the date of such default of payment of premium as mentioned above.

This Policy is issued and accepted upon the condition that the provisions and requirements printed or written by the Society upon the back of this Policy are accepted by the assured as part of this
67 contract, as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof, The Equitable Life Assurance Society of the United States has caused this policy to be signed by two of its Executive Officers, at the office in the City of New York, the fifteenth day of February, A. D. one thousand eight hundred and eighty-nine.

Examined by

S.

H. 88.

Free Tontine.

No person except one of the Executive Officers designated on the back of this Policy, is authorized to make, alter or discharge contracts or waive Forfeitures.

(Endorsed upon the back of the policy are the following provisions and requirements, among others:)

1. That this Policy is issued under the Free Tontine Plan, the particulars of which are as follows:

2. That the Tontine Dividend Period for this Policy shall be completed on the Fifteenth day of February, in the year Nineteen hundred and nine.

3. That no dividend shall be allowed or paid upon this Policy unless the person whose life is hereby assured shall survive the completion of its Tontine Dividend Period as aforesaid, and unless this Policy shall be then in force.

4. That all surplus or profits derived from such Policies on the Free Tontine Plan, as shall not be in force at the date of the completion of their respective Tontine Dividend Periods, shall be apportioned among such Policies as shall complete their Tontine Dividend Periods.

68 5. That upon the completion of the Tontine Dividend Period on February 15th, 1909, provided this Policy shall not have been terminated previously by lapse or death, the said Jacob M. Mertens shall have the privilege of the following options: Either, first to withdraw in cash this Policy's entire share of the assets, *i. e.*, the accumulated reserve, which shall be Eighteen Thousand eight hundred and twenty-three dollars and in addition thereto the sur-

plus apportioned by this Society to this Policy; second, to surrender the Policy for a life annuity; third, to withdraw in cash the share of the accumulated surplus apportioned by said Society to this Policy, and continue the Policy in force on the ordinary plan; fourth, to convert the accumulated profits into paid-up assurance to be added to the amount of the original Policy, and continue this Policy in force on the ordinary plan. To avail of this option, the person whose life is hereby assured must furnish a satisfactory certificate of good health from one of the medical examiners appointed by the Society; fifth, to continue the assurance for the original amount and apply the entire Tontine Dividend to the purchase of an annuity to reduce the subsequent premiums falling due upon this Policy, provided that in any year in which the amount derived from such annuity together with the annual dividend, if any, on this Policy, shall exceed the amount of premium due thereon, the excess shall be paid in cash to said Jacob M. Mertens or assigns; or sixth, to surrender the policy for its entire value in paid-up assurance on which no further payments of premium will be required. When, however, the amount of this paid-up assurance exceeds the amount of the original Policy, a satisfactory certificate of good health will be required from one of the medical examiners appointed by the Society. If either
69 the entire value or surplus be taken in cash, payment shall be made to the said Jacob M. Mertens and his receipt shall be a valid release to the Society.

EXHIBIT H.

The Equitable Life Assurance Society of the United States.

| Premium. | Amount. |
|---|---|
| $272.50. | $10,000. |
| Age 36. | No. 252314. |

(Copy.)

120 Broadway, New York.

Henry B. H*dye*, President.
James W. Alexander, Vice-President.
Samuel Borrowe, 2d Vice-President.
George W. Phillips, Actuary.
William Alexander, Secretary.

In Consideration of the Application for this Policy of Insurance, and of each of the statements made therein; And in further consideration of the payment of the sum of Two hundred and seventy-two dollars and fifty cents at the office of the Society in the City of New York, at the date hereof, the receipt whereof is hereby acknowledged, and of the annual payment of two hundred and seventy-two dollars and fifty cents, to be made at the said Office, on or before the Twenty-first day of December, in every year, during the continuance of this contract; Does Promise to pay to Jennie Mertens, wife of

Jacob M. Mertens, for her sole use if living, in conformity with the Statute, and, if not living, to the surviving children of said Jacob M. Mertens or their guardian for their use, or if there be no such
70 children surviving, then to the executors, administrators or assigns of said Jacob M. Mertens the sum of Ten Thousand dollars (any indebtedness to the Society on account of this contract to be first deducted therefrom) at the Office of the Society in the City of New York, within sixty days after satisfactory proofs of the death of said Jacob M. Mertens of Syracuse, in the County of Onondaga, State of New York, shall have been furnished to the Society at its said office.

And the said Society does hereby further Promise and Agree that after three years from the date hereof, the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums, at the times and place, and in the manner herein stipulated, and that the regulations of the Society as to age, residence, travel, occupation and employments shall be observed, and that in all other respects, if the Policy matures after the expiration of said three years, this Policy shall be Indisputable.

This Policy is issued and accepted upon the condition that the provisions and requirements, printed or written by the Society, upon the back of this Policy, are accepted by the assured as part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof, The Equitable Life Assurance Society of the United States has caused this Policy to be signed by its President and Secretary, at the Office in the City of New York, the Twenty-first day of December, A. D. one thousand eight hundred and eighty-two.

Examined by
S.

____ ____,
*President.*

____ ____,
*Secretary.*

For a Wife.
G. 82.
Tontine Savings Fund Policy.

71 Notice:—In Consideration of the Issuance of this Policy upon the Tontine Savings Fund Plan, all rights to a Paid-up Policy under the Provisions of Chapter 347, Laws of New York of 1879, have been Specifically Waived, Whether such Paid-up Policy be to Cover Temporary Insurance or Insurance to be Continued during the same term as the present Policy.

No person except the President, Vice-President, Actuary, Secretary or Assistant Secretary is authorized to make, alter or discharge contracts or waive Forfeitures.

(Endorsed on the back of the policy are the following provisions and requirements, among others:)

1. That this Policy is issued under the Tontine Savings Fund Plan, the particulars of which are as follows:

2. That the Tontine Dividend Period for this Policy shall be completed on the Twenty-first day of December, in the year Nineteen hundred and two.

3. That no dividend shall be allowed or paid upon this policy unless the person whose life is hereby assured shall survive the completion of its Tontine Dividend Period as aforesaid, and unless this Policy shall be then in force.

4. That all surplus or profits derived from such Policies on the Tontine Savings Fund Assurance Plan, as shall not be in force at the date of the completion of their respective Tontine Dividend Periods, shall be apportioned equitably among such Policies as shall complete their Tontine Dividend Periods.

72 5. That upon the completion of the Tontine Dividend Period on December 21, 1902, provided this policy shall not have been terminated previously by lapse or death, the said Jacob M. Mertens shall have the option either; First, to withdraw in cash this Policy's entire share of the assets; *i. e.*, the accumulated reserve, which shall be Twenty-nine hundred and eight 50/100 dollars, and in addition thereto, the surplus apportioned by this Society to this Policy; secondly, to convert the same into a paid-up policy for an equivalent amount, provided always that if the amount of said paid-up Policy shall exceed the original amount of the assurance, a satisfactory certificate of good health from one of the Society's medical examiners shall be required; thirdly, to continue the assurance for the original amount, and apply the entire Tontine Dividend to the purchase of an annuity to reduce the subsequent premiums falling due upon this Policy, provided that in any year in which the amount derived from such annuity, together with the annual dividend on this Policy, shall exceed the amount of premium due thereon, the excess shall be paid in cash to said Jacob M. Mertens, or assigns; or fourthly, to withdraw in cash the share of the accumulated surplus apportioned by said Society to this Policy, and continue the Policy in force on the ordinary plan.

## Exhibit I.

This Indenture, made this sixteenth day of March, in the year Nineteen Hundred and One, between Jennie Mertens, Cornelia T. Mertens, Ernest T. Mertens, Charles R. Mertens, Francesca A.
73 Wallier, and Edmund A. Mertens of the first part, and the Varick Bank of New York, party of the second part, Witnesseth:

That whereas, the said Jennie Mertens is the wife of Jacob M. Mertens, of Syracuse, N. Y., and said Cornelia T. Mertens, Ernest T. Mertens, Charles R. Mertens, Francesca A. Wallier and Edmund A. Mertens are the only children of said Jacob M. Mertens, and the only beneficiaries in the policy of insurance hereinafter described:

Now, therefore, in consideration of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof

is hereby acknowledged, and for securing the payment of the loan and moneys hereinafter mentioned, the said parties of the first part do hereby sell, assign, transfer and set over unto the said party of the second part, its successors or assigns, policy No. 252314, issued by the Equitable Life Assurance Society of the United States on the Life of Jacob M. Mertens, bearing date the 21st day of December, in the year 1882, with all the right, title and interest therein, together with all the moneys which may be now due or hereafter payable thereunder and all dividends, benefits, options and advantages, to be derived therefrom, including the right to surrender said policy and to receive the surrender value thereof, accounting to the assignors for any surplus which may be realized over and above the amount due upon the loan or moneys advanced hereinafter mentioned.

This assignment of the said policy is made as collateral security for the re-payment to said party of the second part of all loans and moneys advanced and to be advanced and made by the said party of the second part to the co-partnership firm of J. M. Mertens & Co., located and doing business at the City of Syracuse, Onondaga
74 County N. Y., and this assignment shall be void and of no effect and the interest of the assignee in said policy released and discharged, upon the re-payment to said party of the second part of all such loans and moneys so advanced to said firm, together with interest thereon, to secure the payment of which this assignment is made and after notice of such repayment is given to said Society in writing.

It witness whereof, we have hereunto set our hands and seals this sixteenth day of March, 1901, each of us hereby certifying that all of the said parties of the first part are over twenty-one years of age.

JENNIE MERTENS. [L. S.]
CORNELIA MERTENS: [L. S.]
ERNEST T. MERTENS. [L. S.]
CHAS. R. MERTENS. [L. S.]
FRANCESCA M. WALLIER. [L. S.]
EDMUND A. MERTENS. [L. S.]

STATE OF NEW YORK, *County of Onondaga, ss:*

On this 16th day of March, 1901, before me personally came Jennie Martens, Cornelia T. Mertens, Ernest T. Mertens, Charles R. Mertens, Francesca A. Wallier and Edmund A. Mertens, to me known and known to me to be the same persons described in and who executed the foregoing assignment, and personally acknowledged that they executed the same.

PERRY A. WOOD, [SEAL.]
*Notary Public, Onon. Co., N. Y.*

75 EXHIBIT J.

(Copy.)

No. 121.

NEW YORK, *Sep.* 14, 1903.

The Western National Bank of the City of New York.

Pay to the order of Varick Bank of New York Ten Thousand, two hundred seventy-nine 00/100 dollars.

VARICK BANK OF NEW YORK,
A. H. DAY, *Cash'r.*

$10,279.00.

(Endorsed "Varick Bank of New York, A. H. Day, Cash'r.")

United States Circuit Court of Appeals, Second Circuit.

In the Matter of JACOB M. MERTENS and Others, Bankrupts; VARICK BANK OF NEW YORK, a Creditor, Appellant; ALBERT K. HISCOCK, Appellee.

The undersigned hereby stipulate and agree that the foregoing be and the same hereby is a true and correct transcript of the
76 record on appeal in the above-entitled proceeding, and that the excerpts of the papers and documents therein contained be printed in lieu of the several documents and papers filed in the office of the Clerk of the District Court of the United States for the Northern District of New York.

It is further stipulated that the time within which to certify said record be and the same hereby is extended to and including the 1st day of March, 1905, and that an order to that effect be entered without further notice.

Dated February 14th, 1905.

FRIED & CZAKI,
*Attorneys for Appellant.*
LEWIS & CROWLEY,
*Attorneys for Appellee.*

United States District Court for the Northern District of New York.

In the Matter of JACOB M. MERTENS and Others, Bankrupts.

I, William S. Doolittle, Clerk of the District Court of the United States for the Northern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the Dis-
77 trict Court on appeal in the above-entitled matter, as the same has been stipulated by and between the attorneys for appellant and appellee.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Utica, Northern District of New York, this 17th day of February, in the year of our Lord one thousand nine hundred and five, and of the Independence of the said United States the one hundred and twenty-ninth.

[SEAL.] W. S. DOOLITTLE, *Clerk.*

78 United States Circuit Court of Appeals for the Second Circuit.

No. 60. October Term, 1905.

Argued December 20, 1905; Decided February 23, 1906.

In the Matter of JACOB M. MERTENS ET AL., Bankrupts, THE VARICK BANK OF NEW YORK, Appellant.

Appeal from the District Court of the United States for the Northern District of New York.

Before Judges Wallace, Lacombe, and Coxe.

Appeal by the Varick Bank of New York from an order of the District Court, made as a court of bankruptcy, disallowing two claims which the bank sought to prove, one against the partnership estate of the bankrupts and the other against the individual estate of Jacob M. Mertens, one of the partners.

WALLACE, *Circuit Judge:*

The decision of the court below proceeded upon the ground that the bank was a secured creditor for the value of two policies of insurance upon the life of Jacob M. Mertens, and had sold the securities after the filing of the petition in bankruptcy, although prior to the adjudication, in disregard of the provision of Section 57, Subdivision *h*, of the Bankrupt Act; and the order appealed from affirmed orders and rulings of the referee in bankruptcy refusing to allow the claims, and directing the value of the securities to be determined by the resale of them at public auction, upon notice to the trustee and the insurers, and the sum realized thereby to be applied in reduction of the claims.

79 We entertain no doubt that the order appealed from was in substance and effect a rejection of the claims such as to authorize an appeal pursuant to Section 25 of the Bankrupt Act, as well as a review pursuant to Section 24. The bank insisted that its claims were for a definite amount, the amount stated in its proofs of debt less the sum which it had already derived from the sale of the securities. The decision not only disallowed these claims, but left the bank remediless, unless it should consent to allow a different reduction. It is true that upon a resale a larger sum might have been realized, and that the bank would have been a gainer by the event. But if the balance which it asserted to be due was correct, it was en-

titled then and there to have its claims allowed for the amount specified, and to insist that it should not be exposed to the chances of a larger reduction.

The propriety of the disallowance of the claim against the partnership estate depends upon considerations which are peculiar to that claim and have no bearing upon the claim against the individual estate of Jacob M. Mertens. If the securities were not the property of the partnership when they were pledged to the bank as collateral for the payment of the indebtedness, the bank was entitled to have its claim against the partnership allowed, and allowed at its face without any deduction. If they were not part of the partnership assets, they were not part of the joint estate in bankruptcy, and as to that estate the bank was under no obligation to apply or realize their value in reduction of its claim. If they were the property of Jacob M. Mertens individually, and were pledged by him, the bank would have been at liberty upon selling them to apply the proceeds to the payment of his individual debt; and no application having been made at the time, the settled rule of equity and of the courts of bankruptcy required the application of the proceeds in exoneration of the individual estate.

In the case of Plummer (1 Phillips, 56) the Lord Chancellor in his opinion said: "In administration under bankruptcy, the joint estate and separate estate are considered as distinct estates; and accordingly it has been held that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security, upon the ground that it is a different estate."

In Wilder *v.* Keeler (3 Paige, 167) Chancellor Walworth said: "A creditor of a joint estate is always entitled to whatever he may obtain out of the fund in the hands of the surviving partner, without relinquishing his security against the separate estate of the deceased partner."

In *Ex Parte* Whiting (14 Nat. Bank Register, 307) Judge Lowell said: "When one partner has pledged his shares for the debts of the firm, proof may be made in full against the assets of the firm, because it is only when the proof is against the same estate which furnished security, that a sale and application of the security is required by the bankrupt law." Many other authorities might be cited to the same effect, but the doctrine is so well established that it would be superfluous to refer to them. The provisions of the present Bankrupt Act requiring secured creditors to surrender preferences, and when the security is not preferential to have its value determined as a condition precedent to the allowance of their claims, have no application to cases in which the security was not the property of the bankrupt.

There was no evidence tending to show that the policies belonged to the partnership, except the circumstance that on one occasion the partnership made an agreement pledging them to the bank for the payment of a partnership note and all other liabilities to the bank which might thereafter arise. As the policies insured the life of Jacob M. Mertens, and were payable, one to him or his legal representatives, and the other to his wife or surviving children and to him

in the event of their death before his, the legitimate presumption is that the title to one of them was his absolutely, and the title to the other was in his wife, his children and himself. The circumstance that the partnership pledged them does not afford a scintilla of legal evidence that the title was in the partnership. There are in-
81 struments to which the title passes by delivery, such as notes and ordinary bonds for the payment of money. Possession of an instrument of this class is presumptive evidence of title, and the holder can recover in an action upon it by producing it upon the trial, without further evidence of title. But a policy of insurance does not belong to this class of instruments, and because possession is not *prima facie* evidence of title, no recovery can be had by the holder upon it, when not payable to him, without proof of an assignment. The agreement pledging the policies was not even moral evidence that they were owned by the partnership, because it appears that Jacob M. Mertens joined in it individually by a separate agreement executed contemporaneously and endorsed upon its back.

We conclude that the claim against the partnership estate should have been allowed in full.

The bank's claim against the individual estate was for an indebtedness of $9,118, the balance alleged to be due from Jacob M. Mertens, after crediting his account with the proceeds of the sale of the two policies which had been pledged to the bank as collateral for the payment of the indebtedness. The pledge was made long prior to the filing of the petition in bankruptcy, and it is not asserted that it was preferential. By its terms the bank was authorized, upon default in the payment of any part of the indebtedness, to "sell, assign, or otherwise dispose of the said collateral security at public or private sale, with or without notice to the pledgor," and to "purchase the whole or any part of the property sold free from any right of redemption" on the part of the pledgor. After the petition in involuntary bankruptcy, and on September 14, 1903, the bank caused the two policies to be sold by an auctioneer at a public salesroom, without any notice having been given to any person except its own agents. There was no competition at the sale, and upon the bid of its own agent the bank became the purchaser for the sum of $10,250. No testimony was offered by the trustee to show that the value of the policies was greater than the amount of the bid, and there
82 is no evidence in the record of the value independently of the bid.

If this was such a sale as was authorized by the terms of the pledge, we do not doubt that the bank in making it was within its rights, and that no rule of the common law or doctrine of equitable jurisprudence, and none of the provisions of the Bankrupt Act, can be invoked to defeat or invalidate it.

Except for the terms of the pledge, the sale would have been voidable; if for no other reason, because the bank purchased the policies. (Story on Bailments, § 319.) But in this respect, as also with respect to a private sale without notice, the pledgor had by his contract consented in advance to that which was done by the bank. Indeed, by the stipulation of such a pledge as this was the pledgor in effect

commits the disposition of his property, in case of his failure to pay his obligation, practically to the honor of the pledgee, and releases the pledgee from all the legal obligations which would ordinarily rest upon him in disposing of the property to satisfy his demand. The authorities sanction such contracts. In Baker *v.* Drake (66 N. Y., 518) it was decided that the parties to a transaction which creates the relation of pledgee and pledgor between them, may provide by contract for any manner of disposing of the pledge to satisfy the claim upon it, which is not in contravention of a statute, against public policy, or fraudulent. In Toplitz *v.* Bauer (161 N. Y., 332) the court said: "In recent times the rights of the parties to enter into a contract providing for a sale or disposition without notice have been recognized, and the disability of the pledgee to become a purchaser, it is said, may be removed by express stipulation of the parties." In Williamson *v.* United States Trust Co. (133 N. Y., 660), where the terms of the pledge authorized the pledgees to sell the securities "in such manner as they in their discretion may deem proper, without notice," the sale without notice was upheld. In Fidelity Insurance Co. *v.* Roanoke Iron Co. (81 F. R., 440) it was decided that the holder of collateral security for a debt, who had been given by the terms of the pledge full power and authority, on failure of the debtor to pay, to sell the collateral at public or private sale, and without advertising or giving the pledgor any notice or making any demand for payment, may buy such collateral, at a sale conducted in good faith, and thereby acquire a good title. The court said: "It is undoubtedly true that where a pledgee without authority sells negotiable collateral, he cannot become the purchaser; but this doctrine does not apply in a case like this, where the pledgee is given full power and authority, on the failure of the debtor to meet the obligation for which the collateral is given, to sell the collateral at public or private sale, and without advertising or giving to the pledgor any notice or making any demand for payment. * * * It would be imposing great hardship and injustice upon the pledgee, under the circumstances of this case, to say that while acting under the authority given him by the pledgor, and in good faith, he shall be required to stand by and see the only security he has for the payment of his debt perhaps sacrificed, and he not permitted to protect his interests in the only way he can, by becoming the purchaser himself." It will be noticed that in the case there was no stipulation authorizing the pledgee to become the purchaser. See also Manning *v.* Shriver (79 Md., 41); Appleton *v.* Turnbull (84 Me., 72); Chouteau *v.* Allen (70 Mo., 290). It may happen that a pledgee will be unable to obtain from others the sum which he believes he may be able to realize from the property by purchasing it himself, and disposing of it when a favorable opportunity offers. If a pledgor sees fit to consent to a stipulation like those in this case, there would seem to be no reason why he should not be held to the contract.

83

The court below regarded the sale made by the bank as a fraudulent sale. There was no evidence of fraud, unless the facts which have been referred to justify the inference of fraud. We are at a

loss to understand how fraudulent conduct can justly be imputed to a pledgee when it appears that whatever was done in executing the power of sale was done in full compliance with the terms
84 of the pledge, and when there is no evidence than any unconscionable advantage was taken of the pledgor or his creditors. Doubtless the pledgee cannot avail himself of his authority, however unlimited, to sacrifice the property wantonly, or to purchase it himself at a valuation so inadequate as to suggest a fraudulent purpose. If the valuation in this case was unfair, the burden was on the trustee to prove the fact.

The decision of the court below proceeded not only upon the ground that the sale was unwarranted by the terms of the pledge, but also upon the ground that having been after the filing of the petition in bankruptcy it was inoperative and subject to the supervision and control of the court, because the Act suspends the exercise of the pledgee's remedy pending the adjudication of bankruptcy.

By the present Act the title of the trustees is vested in the estate of the bankrupt "as of the date he was adjudged a bankrupt." We are of opinion that until the date of the adjudication a lienor or pledgee is at liberty to perfect any title which the nature of the lien permits. Under the Act of 1867 no lien could be acquired after the filing of the petition in bankruptcy because the title of the assignee vested as of the commencement of the proceeding in bankruptcy. Now the trustee takes the property of the bankrupt in the condition in which he finds it at the date of the adjudication, unless it has been encumbered fraudulently or in contravention of some of the provisions of the Act. Under the former Act there were many decisions that a lien previously acquired could not be enforced subsequent to the commencement of the proceeding except with the permission of the bankruptcy court. The Supreme Court however refused to sanction these decisions, and held that the lienor was entitled to perfect his title and enforce his rights as though no proceeding had been commenced. Eyster *v.* Gaff (91 U. S., 521); Jerome *v.* McCarter (94 U. S., 734). The change in the present Act, by which the trustee's title is that only which exists at the date of the adjudication, removes any uncertainty which arose under the Act of 1867. It was intended, we think, to permit all legitimate business transactions between
85 a debtor and those dealing with him to be carried out and consummated as freely until he has been adjudicated a bankrupt as though no proceeding were pending. In many cases the proceeding against an alleged bankrupt is unfounded, and for this and other reasons never culminates in an adjudication. While the filing of a petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor, or to prevent lienors or pledgees from enforcing their contracts. This is its practical effect if the rights and remedies of all concerned are in suspense until it can be ascertained whether an adjudication is or is not to follow the commencement of the proceeding. That Congress did not intend that lienors or pledgees should be prejudiced in enforcing their rights by the commencement of the proceedings in bankruptcy is indicated by the change made

in the present Act with respect to the proof of claims by secured creditors. By the former Act it was provided that a secured creditor should be admitted as a creditor only for the balance of his debt after deducting the value of the pledged property ascertained by an agreement between him and the assignee in bankruptcy, or by a sale under the direction of the court. Under that provision, if a pledgee sold the pledged property prior to the appointment of the assignee, or without the permission of the court, he was precluded from proving his claim or obtaining any share of the bankrupt's estate to which he would otherwise have been entitled. The present Act provides that the value of his security may be determined, among other methods, by converting it into money pursuant to his contract rights, and thus if he has enforced it as the contract with the debtor allowed he is permitted to prove the unsatisfied balance of his claim. Section 57, Subdivision *h*, prescribes several modes of valuation, and the one referred to is exclusive of the others and is superfluous and useless unless it is intended to authorize the creditor without interference by the trustee or the court to value his own security, provided
86 he turns it into money "according to the terms of the agreement pursuant to which" it was delivered to him.

We conclude that the claim against the individual estate should have been allowed for the balance claimed.

The order of the court below is reversed with costs and with instructions to proceed conformably with this opinion.

F. M. Czaki, for the Appellant.
W. B. Crowley, for the Appellees.

87 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 5th day of March one thousand nine hundred and six.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Circuit Judges.

In the Matter of JACOB M. MERTENS ET AL., Bankrupts; THE VARICK BANK OF NEW YORK, Appellant.

Appeal from the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed with costs, and with instructions to the court below to proceed in accordance with the opinion of this Court.

W. J. W.
E. H. L.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

88 Endorsed: United States Circuit Court of Appeals, Second Circuit. Matter of Mertens. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 5, 1906. William Parkin, Clerk.

89 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts; THE VARICK BANK OF NEW YORK, Appellant.

The Varick Bank of New York having appealed to this Court from an order and decree of the District Court of the United States for the Northern District of New York, and said appeal having come on to be heard, this Court having made and filed its decision, does make the following findings to be filed with its decree herein.

This Court finds as matters of fact:

1. On August 18, 1903, an involuntary petition in bankruptcy was filed against said bankrupts individually and as such co-partners, and Albert K. Hiscock was on that day duly appointed receiver of their estates in bankruptcy and qualified as such. On September 15, 1903, they were duly adjudicated bankrupts. Thereafter said Hiscock was duly elected and qualified as trustee of said estates.

2. At the time of the filing of the petition, the Varick Bank of New York held notes made or endorsed or guaranteed by Jacob M. Mertens & Co., said co-partnership, of various dates aggregating in amount $27,893.85. Of said notes five, aggregating in amount $22,500 were collateral notes. The following is a complete copy of one of them and each was executed upon a printed form like that in this copy:

$5,000.00. NEW YORK, N. Y., *April 20th*, 1903.

Four months after date, for value received, the undersigned, jointly and severally promise to pay to the Varick Bank of New York,
90 N. Y., or order, at its Banking Office, 260 West Broadway, N. Y., in funds current through the New York Clearing House, Five Thousand Dollars thereof, as well as for the payment of any other liability or liabilities of the undersigned to the holder of this note, due or to become due, whether now existing or hereafter arising, the following property, viz:

Insurance policy No. 417,171 for $50,000.00 in the Equitable Life Assurance Society of New York of a market value estimated by the undersigned at $— and the undersigned agree to deliver to the said holder additional securities to its satisfaction, should the market value of the said securities as a whole, suffer any decline or the Bank at any time deem the securities insufficient, and also hereby give to the said Bank (but no other holder) a lien for the amount of all the liabilities of the undersigned to it upon all the property or securities given unto or left in the possession of the said Bank by the undersigned and also upon any balance of the deposit account of the undersigned with the said bank.

On the non-performance of this promise or upon the non-payment of any of the liabilities above mentioned, or upon the failure of the undersigned forthwith, with or without notice, to furnish satisfactory additional securities in case of decline as aforesaid,—then, and in either such case, this note shall forthwith become due and payable, without demand or notice and full power and authority are hereby given to said holder to sell, assign and deliver the whole of the said securities, or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto or left in the possession of the holder by the undersigned, for safe keeping or otherwise, at any Broker's Board or at public or private sale, at the option of the said holder, without either demand, advertisement or notice of any kind, which are hereby expressly waived. At any such sale the said holder may purchase the whole or any part of the property sold, free from any right of redemption on the part of the undersigned, which is hereby waived
91 and released. In case of sale for any cause, after deducting all costs or expenses of every kind for collection, sale or delivery, the said holder may apply the residue of the proceeds of the sale or sales so made, to pay one or more or all of the said liabilities to it or him as to it or him shall seem proper, whether then due or not due, making proper rebate for interest on liabilities not then due, and returning the overplus, if any, to the undersigned, who agree to be and remain liable to the said holder for any deficiency arising upon such sale or sales. The undersigned do hereby authorize and empower the said Bank (but no other holder) at its option, at any time, to appropriate and apply to the payment and extinguishment of any obligations or liabilities of the undersigned to it, whether now existing or hereafter contracted any and all moneys now or hereafter in the hands of the said Bank, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due.

J. M. MERTENS & CO.

(Endorsed on the back is the following:)

In consideration of one dollar paid to the undersigned, and of the making, at the request of the undersigned, of the loan evidenced by the within note, the undersigned hereby jointly and severally guarantee to the Varick Bank of New York, N. Y. its successors, endorsers or assigns, the punctual payment, at maturity, of the said loan, and hereby assent to all the terms and conditions of the said note and consent that the securities for the said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan extended without notice to or further assent from the undersigned, who will remain bound upon this guaranty, notwithstanding such changes, surrender or extension.

J. M. MERTENS & CO.
J. M. MERTENS.

Protested for non-payment Aug. 20th, 1903.

7—244

92 The other four collateral notes are described as follows:

Note dated May 4, 1903, due September 4, 1903, for $5,000 made by J. M. Mertens & Co., and endorsed by J. M. Mertens & Co., and Jacob M. Mertens, depositing as collateral security insurance policy No. 417,171 for $50,000 in the Equitable Life Assurance Society of New York.

Note dated July 17, 1903, due November 17, 1903, for $5000 made by J. M. Mertens & Co. and endorsed by J. M. Mertens & Co. and Jacob M. Mertens, depositing as collateral security insurance policy No. 417,171 for $50,000 in the Equitable Life Assurance Society of New York.

Note July 20, 1903, due November 20, 1903, made by J. M. Mertens & Co. and endorsed by J. M. Mertens & Co. and Jacob M. Mertens, depositing as collateral security insurance policy No. 252,314 for $10,000 in the Equitable Life Assurance Society of New York. Note in the amount of $5,000.

Note dated August 6, 1903, due December 7, 1903, made by J. M. Mertens & Co. and Jacob M. Mertens and endorsed by J. M. Mertens & Company, Jacob M. Mertens and Jennie Mertens, depositing as collateral security insurance policies No. 417,171 for $50,000, and No. 252,314 for $10,000 in the Equitable Life Assurance Society of New York. Note in the amount of $2500.

3. At the time of the filing of the petition in bankruptcy, said Varick Bank held notes guaranteed or endorsed by Jacob M. Mertens individually of various dates, aggregating in amount $25,489.62. Of said notes, five aggregating in amount $22,500 were collateral notes, being the same collateral notes mentioned above. One of these notes, amounting to $2500 was made by Jacob M. Mertens and by Jacob M. Mertens & Co., that being the only note on which Jacob M. Mertens was liable as maker.

4. At the time of the filing of the petition in bankruptcy, said Varick Bank held as collateral to said indebtedness the policies mentioned in said notes, the same being held under the terms of said notes and under two assignments, one of which was a collateral assignment of policy No. 252314, as security
93 for the sum of $5,000 executed by Jennie Mertens and Jacob M. Mertens, which assignment contained no provision for or power of sale whatever. The other was a collateral form of assignment of policy No. 417171 as security for the sum of $15,000, executed by Jennie Mertens and Jacob M. Mertens, which assignment contained no provision for or power of sale whatever. Said policy No. 417171 was issued by the Equitable Life Assurance Society and provides as follows:

EXHIBIT G.

The Equitable Life Assurance Society of the United States.

Premium, $1735.00
Age 42.

Amount, $50,000.
No. 417171.

(Copy.)

120 Broadway, New York.

President:
Henry B. Hyde.
George W. Phillips, Actuary.
J. G. Van Cise, Assistant Actuary.
S. D. Ripley, Cashier.
William Alexander, Secretary.
Thomas D. Jordan, Assistant Secretary.
Edward A. Pearson, 2d. Assistant Sec'y.
James B. Loring, Registrar.
James W. Alexander, Vice President.
Samuel Borrowe, Second Vice President.
Edward W. Scott, Third Vice President.

In consideration of the application for this policy of insurance, and of each of the statements made therein; And in further consideration of the payment of the sum of Seventeen Hundred and Thirty-Five Dollars and — cents, at the office of the Society in the City of New York, at the date hereof and of the annual payment of seventeen hundred and thirty-five dollars and — cents, to be made at the said office, on or before the Fifteenth day of February, in every year, during the continuance of this contract;

94 Does promise to pay to Jacob M. Mertens, his executors, administrators or assigns, the sum of Fifty Thousand Dollars, (any indebtedness to the Society on account of this contract to be first deducted therefrom), at the Office of the Society, in the City of New York, within sixty days after satisfactory proofs of the death of said Jacob M. Mertens, of Syracuse, in the County of Onondaga, State of New York, shall have been furnished to the Society at its said office.

And the said Society does hereby further promise and agree that after two years from the date hereof, the only conditions which shall be binding upon the holder of this Policy are that he shall pay the premiums, at the times and place, and in the manner herein stipulated, and that the regulations of the Society as to age and service in war shall be observed, and that in all other respects, if the policy matures after the expiration of said two years, this policy shall be indisputable.

And further, that if premiums upon this policy, for not less than three complete years of assurance, shall have been duly received by said Society, and this policy should thereafter become void, in con-

sequence of default in payment of a subsequent premium, said Society will issue in lieu of such policy, a new paid-up policy, without participation in profits in favor of said Jacob M. Mertens, his executors, administrators or assigns, for the entire amount which the full reserve on this policy, according to the present legal standard of the State of New York, will then purchase as a single premium, calculated by the regular table for single premium policies, now published by the Society; provided, however, that this policy shall be surrendered duly receipted within six months of the date of such default of payment of premium as mentioned above.

This policy is issued and accepted upon the condition that the provisions and requirements printed or written by the Society
95 upon the back of this policy are accepted by the assured as part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof, the Equitable Life Assurance Society of the United States, has caused this policy to be signed by two of its Executive Officers, at the office in the City of New York the Fifteenth day of February, A. D., One Thousand Eight Hundred and Eighty-Nine.

Examined by S.
H 88 Free Tontine.

No person except one of the Executive Officers designated on the back of this policy is authorized to make, alter or discharge contracts or waive Forfeitures.

(Endorsed upon the back of the policy are the following provisions and requirements among others.)

1. That this policy is issued under the Free Tontine Plan, the particulars of which are as follows:

2. That the Tontine Dividend Period for this policy shall be completed on the Fifteenth day of February, in the year Nineteen Hundred and Nine.

3. That no dividend shall be allowed or paid upon this policy unless the person whose life is hereby assured shall survive the completion of its Tontine Dividend Period as aforesaid, and unless this policy shall be then in force.

4. That all surplus or profits derived from such policies on the Free Tontine Plan, as shall not be in force at the date of the completion of their respective Tontine Dividend Periods, shall be apportioned among such policies as shall complete their Tontine Dividend Periods.

5. That upon the completion of the Tontine Dividend Period on February 15th, 1909, provided this policy shall not have been terminated previously by lapse or death, the said Jacob M. Mertens shall have the privilege of the following options: Either, first to withdraw in cash this policy's entire share of the assets, *i. e.*, the accu-
96 mulated reserve, which shall be eighteen thousand eight hundred and twenty-three dollars, and in addition thereto the surplus apportioned by this Society to this policy; second, to surrender the policy for a life annuity; third, to withdraw in cash the

share of the accumulated surplus apportioned by said Society to this policy, and continue the policy in force on the ordinary plan; fourth, to convert the accumulated profits into paid up assurance to be added to the amount of the original policy, and continue this policy in force on the ordinary plan. To avail of this option, the person whose life is hereby assured must furnish a satisfactory certificate of good health from one of the medical examiners appointed by the Society; fifth, to continue the assurance for the original amount and apply the entire Tontine Dividend to the purchase of an annuity to reduce the subsequent premiums falling due upon this policy, provided that in any year in which the amount derived from such annuity, together with the annual dividend, if any, on this policy, shall exceed the amount of premium due thereon, the excess shall be paid in cash to said Jacob M. Mertens or assigns; or sixth, to surrender the policy for its entire value in paid-up assurance on which no further payments of premium will be required. When, however, the amount of this paid-up assurance exceeds the amount of the original policy, a satisfactory certificate of good health will be required from one of the medical examiners appointed by the Society. If either the entire value or surplus be taken in cash, payment shall be made to the said Jacob M. Mertens and his receipt shall be a valid release to the Society.

Said policy No. 252314 was issued by the Equitable Life Assurance Society and provides as follows:

EXHIBIT H.

The Equitable Life Assurance Society of the United States.

Premium $272.50 Age 36

Amount $10,000. No. 252314

(Copy.

97 120 Broadway, New York.

Henry B. Hyde, President.
James W. Alexander, Vice President.
Samuel Borrowe, 2d, Vice President.
George W. Phillips, Actuary.
William Alexander, Secretary.

In consideration of the application for this policy of insurance, and of each of the statements made therein; and in further consideration of the payment of the sum of two hundred and seventy-two dollars and fifty cents at the office of the Society in the City of New York, at the date hereof, the receipt whereof is hereby acknowledged, and of the annual payment of two hundred and seventy-two dollars and fifty cents, to be made at the said office, on or before the twenty-first day of December in every year, during the continuance of this contract; does promise to pay to Jennie Mertens, wife of Jacob M.

Mertens, for her sole use if living, in conformity with the statute and, if not living, to the surviving children of said Jacob M. Mertens, or their guardian for their use, or if there be no such children surviving, then to the executors, administrators or assigns of said Jacob M. Mertens, the sum of ten thousand dollars (any indebtedness to the society on account of this contract to be first deducted therefrom) at the office of the Society in the City of New York, within sixty days after satisfactory proofs of the death of said Jacob M. Mertens of Syracuse, in the County of Onondaga, State of New York, shall have been furnished to the Society at its said office.

And the said Society does hereby further promise and agree that after three years from the date hereof the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums, at the times and place and in the manner herein stipulated, and that the regulations of the Society as to age, residence, travel, occupation and employment shall be observed, and that in all other respects, if the policy matures after the expiration
98 of said three years, this policy shall be indisputable.

This policy is issued and accepted upon the conditions that the provisions and requirements, printed or written by the Society, upon the back of this Policy, are accepted by the assured as part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof, the Equitable Life Assurance Society of the United States has caused this policy to be signed by its President and Secretary at the office in the City of New York, the twenty-first day of December, A. D., One Thousand Eight Hundred and Eighty-Two.

Examined by S.

——— ———, ——— ———,
*Secretary.* *President.*

For a wife G 82 Tontine Savings Fund Policy.

Notice.—In consideration of the issuance of this policy upon the Tontine savings fund plan, all rights to a paid-up policy under the provisions of chapter 347, Laws of New York of 1879, have been specifically waived, whether such paid up policy be to cover temporary insurance or insurance to be continued during the same term as the present policy.

No person except the President, Vice-President, Actuary, Secretary or Assistant Secretary, is authorized to make, alter or discharge contracts or waive forfeitures.

(Endorsed on the back of the Policy are the following provisions and requirements among others).

1. That this policy is issued under the Tontine Savings Fund Plan, the particulars of which are as follows:

2. That the Tontine Dividend Period for this policy shall be completed on the twenty-first day of December, in the year Nineteen Hundred and Two.

3. That no dividend shall be allowed or paid upon this Policy unless the person whose life is hereby assured shall survive the completion of its Tontine Dividend Period, as aforesaid, and unless this Policy shall be then in force.

4. That all surplus or profits derived from such policies
99 on the Tontine Savings Fund assurance plan, as shall not be in force at the date of the completion of their respective Tontine Dividend periods, shall be apportioned equitably among such policies as shall complete their Tontine Dividend Periods.

5. That upon the completion of the Tontine Dividend Period on December 21, 1902, provided this policy shall not have been terminated previously by lapse or death, the said Jacob M. Mertens shall have the option either: First, to withdraw in cash this policy's entire share of the assets, *i. e.*, the accumulated reserve, which shall be twenty-nine hundred and eight 50/100 dollars, and in addition thereto, the surplus apportioned by this Society to this policy; secondly, to convert the same into a paid-up policy for an equivalent amount, provided always that if the amount of said paid-up policy shall exceed the original amount of the assurance, a satisfactory certificate of good health from one of the Society's medical examiners shall be required; thirdly, to continue the assurance for the original amount, and apply the entire Tontine Dividend to the purchase of an annuity to reduce the subsequent premiums falling due upon this policy, provided that in any year in which the amount derived from such annuity, together with the annual dividend on this policy shall exceed the amount of premium due thereon, the excess shall be paid in cash to said Jacob M. Mertens, or assigns; or fourthly, to withdraw in cash the share of the accumulated surplus apportioned by said Society to this policy, and continue the policy in force on the ordinary plan.

5. On or about September 9, 1904, said Varick Bank filed two proofs of claim upon the foregoing notes, one against the co-partnership, and the other against Jacob M. Mertens individually for $9,-118.37, and on November 30, 1904, filed amended proofs as follows:

100 In the District Court of the United States for the Northern District of New York.

In Bankruptcy. 1527.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS and EDMUND A. MERTENS, and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

At New York City, in the Southern District of New York, on the 30th day of November, 1904, came Addison H. Day, of the Town of Chatham, in the County of Morris, State of New Jersey, and for this an amendment of a proof of debt heretofore filed herein by the Varick Bank of New York, makes oath and says:

That he is the Cashier of the Varick Bank of New York, a cor-

poration incorporated by and under the Laws of the State of New York and authorized to do business in the City of New York, County and State of New York. That this proof is not made by the Treasurer of such corporation for the reason that said corporation has no Treasurer, and that the affiant is an officer of said corporation and his duties most nearly correspond to those of treasurer and that he is duly authorized to make this proof; and that the said Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, as composing the firm of J. M. Mertens & Co., against whom a petition for adjudication of bankruptcy has been filed, were at and before the filing if said petition, and still are, justly and truly indebted to the said corporation in the sum of twenty-seven thousand eight hundred and ninety-three and 85/100 ($27,893.85) dollars. That the consideration of said debt is as follows:

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York, duly discounted for the account of said bankrupts, a certain promissory note in writing made by
101 Cole & Spellman, dated May 15, 1903, due the 17th day of August, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of two hundred and eighty and 61/100 ($280.61) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof and for a valuable consideration thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of said bankrupt, a certain promissory note in writing, made by Cole & Spellman, dated April 15, 1903, due the 17th day of August, 1903, and endorsed by the said J. M. Mertens & Co. for the sum of four hundred and twenty and 29/100 ($420.29) dollars. That the said Varick Bank of New York fully discounted the said promissory note as aforesaid before maturity thereof and for a valuable consideration thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing, made by G. W. Hydron, dated April 18, 1903, due August 18, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of four hundred and ninety-four and 72/100 ($494.72) dollars. That the said Varick Bank of New York City duly discounted the said promissory note as aforesaid before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein, the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing, made by G. W. Hydron, dated April 18, 1903, and due August 18, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of four
102 hundred and ninety-six and 31/100 ($496.31) dollars. That the said Varick Bank of New York duly discounted the said

promissory note as aforesaid, before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof and are still the owners thereof.

That heretofore and prior to the filing of the petition herein the said Varick Bank of New York duly discounted for the account of the said Bankrupts, a certain promissory note in writing made by Clarence H. Spraker, dated April 1, 1903, due August 31, 1903, and endorsed by the said J. M. Mertens & Co., for the sum of one hundred ($100) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof, and are still the owners thereof.

That heretofore and prior to the filing of the petition herein the said Varick Bank of New York duly discounted for the account of the said bankrupts, a certain promissory note in writing made by John S. Hough, dated July 10, 1903, due November 10, 1903, and endorsed by the said J. M. Mertens & Co. for the sum of six hundred and twelve and 30/100 ($612.30) dollars. That the said Varick Bank of New York duly discounted the said promissory note as aforesaid, before maturity thereof, and for a valuable consideration, thereby becoming the lawful owner and holder thereof and are still the owners thereof.

That heretofore and on or about the 20th day of April, 1903, the said Varick Bank of New York, for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing, dated on said date, and due the 20th day of August, 1903, and endorsed by the said Jacob M. Mertens & Co., and Jacob M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 4th day of May, 1903, the said Varick Bank of New York for a valuable consideration,
103 duly discounted for the account of J. M. Mertens & Co., their promissory note in writing, dated on said date and due the 4th day of September, 1903, and endorsed by the said J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 17th day of July, 1903, the said Varick Bank of New York for a valuable consideration, duly discounted for the account of said J. M. Mertens & Co., their promissory note in writing, dated on said date, and due the 17th day of November, 1903, and endorsed by J. M. Mertens & Co. and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 20th day of July, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 20th day of November, 1903, and endorsed by J. M. Mertens & Co., and J. M. Mertens, indi-

vidually, for the sum of five thousand ($5,000) dollars and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 6th day of August, 1903, the said Varick Bank of New York, for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing dated on said date and due the 7th day of December, 1903, made and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, and endorsed by Jennie Mertens for the sum of two thousand five hundred ($2500), and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 21st day of April, 1903, and due the 21st day of August, 1903, made by the Rochester Cloth-
104 ing Company, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 1st day of July, 1903, and due the 1st day of September, 1903, made by E. G. Fox & Son, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of one hundred and twenty-six and 51/100 ($126.51) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note, dated the 8th day of May, 1903, and due the 8th day of September, 1903, made by J. Warren Bullen, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of one thousand dollars ($1,000) *dollars.* That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition hereof, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note dated the 1st day of July, 1903, and due the 1st day of October, 1903, made by John S.
105 Hough, and endorsed by J. M. Mertens & Company and J. M. Mertens, individually, for the sum of six hundred and thirty-nine and 5/100 ($639.05) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the

lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note, dated the 2nd day of June, 1903, and due the 2nd day of October, 1903 made by the Rochester Clothing Company and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That no part of said debt has been paid by the said J. M. Mertens & Co. That there are no offsets or counterclaims to the same, except the sum of one hundred and seventy-three and 21/100 ($173.21) dollars, held by the Varick Bank of New York as a general deposit to the credit of J. M. Mertens & Co., bankrupts above named, at the time of the filing of the petition in bankruptcy herein, and the said J. M. Mertens & Co., bankrupts above named, are entitled to a rebate for unearned interest at the time of the filing of the petition in bankruptcy herein in the sum of one hundred and fifty-six and 17/100 ($156.17) dollars, leaving due and owing to the said Varick Bank of New York the sum of twenty-seven thousand five hundred and sixty-four and 47/100 ($27,564.47) dollars, and upon which indebtedness no judgment has been rendered; and that said corporation has not, nor has any person for its order, or to the knowledge or belief of deponent, for its use, had or received any manner of
106 security for said debt from the said J. M. Mertens & Co.

That at the time of the filing of said petition, the said Varick Bank of New York held as collateral security for the payment of the said debt, which said collateral was deposited by J. M. Mertens, individually, the following described property, to wit:

The sum of six thousand ($6,000) dollars cash, held on deposit with the Varick Bank of New York, for the individual account of J. M. Mertens, a certain policy of insurance upon the life of Jacob M. Mertens, in the Equitable Life Assurance Society of the United States, Numbered 417171 for the sum of fifty thousand ($50,000) dollars, and a certain other insurance policy upon the life of Jacob M. Mertens in the said Equitable Life Assurance Society of the United States, Numbered 252314, for the sum of ten thousand ($10,000) dollars.

ADDISON H. DAY, [SEAL.]
*Cashier of Varick Bank of New York.*

Subscribed and sworn to before me this 30th day of November, 1904.

HENRY J. DORGELOH,
[SEAL.] *Notary Public, Kings Co.*

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, Individually, Bankrupt.

At New York City, in the Southern District of New York, on the 30th day of November, 1904, came Addison H. Day, of the Town of Chatham, in the County of Morris, State of New Jersey, and for this an amendment of a proof of debt heretofore filed herein
107 by the Varick Bank of New York, makes oath and say-

That he is the Cashier of the Varick Bank of New York, a corporation incorporated by and under the laws of the State of New York, and authorized to — business in the City of New York, County and State of New York. That this proof is not made by the treasurer of such corporation for the reason that said corporation has no treasurer and that the affiant is an officer of said corporation and his duties most nearly correspond to those of treasurer and that he is duly authorized to make this proof; and that the said Jacob M. Mertens against whom a petition for adjudication in bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of twenty-five thousand four hundred and eighty-nine and 62/100 ($25,489.62) dollars. That the consideration for said debt is as follows:

That heretofore and on or before the 20th day of April, 1903, the said Varick Bank of New York, for a valuable consideration, duly discounted to the account of J. M. Mertens & Co., their promissory note in writing, dated on said date and due the 20th day of August, 1903, and endorsed by the said Jacob M. Mertens & Co., and Jacob M. Mertens, individually, for the sum of five thousand ($5,000) dollars and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and on or about the 4th day of May, 1903, the said Varick Bank of New York, for a valuable consideration, duly discounted for the account of J. M. Mertens & Co., their promissory note in writing, dated on said date, and due the 4th day of September 1903, and endorsed by the said J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and on or about the 17th day of July, 1903, the said Varick Bank of New York for a valuable consideration, duly discounted for the account of J. M. Mertens & Co., their
108 promissory note in writing dated on said date and due the 17th day of November, 1903, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and on or about the 20th day of July, 1903, the said Varick Bank of New York, for a valuable consideration, duly discounted for the account of J. M. Mertens & Co., their promissory note in writing, dated on said date and due the 20th day of

November, 1903, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of five thousand ($5,000) dollars, and that the said Varick Bank of New York are now the lawful owners and holders thereof.

That heretofore and on or about the 6th day of August, 1903, the said Varick Bank of New York for a valuable consideration duly discounted for the account of J. M. Mertens & Co., their promissory note in writing, dated on said date and due the 7th day of December, 1903, made and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, and endorsed by Jennie Mertens, for the sum of two thousand five hundred ($2,500) dollars, and that the said Varick Bank of New York is now the lawful owner and holder thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note, dated the 21st day of April, 1903, and due the 21st day of August, 1903, made by the Rochester Clothing Company and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration and before maturity, thereby becoming the lawful owner and holder thereof and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition
109 herein, the Varick Bank of New York duly discounted for said J. M. Mertens & Co., a certain promissory note, dated the 1st day of July, 1903, and due the 1st day of September, 1903, made by E. G. Fox & Son, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of one hundred and twenty-six and 51/100 ($126.51) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 8th day of May, 1903, and due the 8th day of September, 1903, made by J. Warren Bullen, and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually, for the sum of one thousand ($1,000) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co. a certain promissory note dated the 1st day of July, 1903, and due the 1st day of October, 1903, made by John S. Hough and endorsed by J. M. Mertens & Company, and J. M. Mertens, individually, for the sum of six hundred and thirty-nine and 5/100

($639.05) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner thereof.

110 That heretofore and prior to the filing of the petition herein, the Varick Bank of New York duly discounted for the said J. M. Mertens & Co., a certain promissory note, dated the 2nd day of June, 1903, and due the 2nd day of October, 1903, made by the Rochester Clothing Company and endorsed by J. M. Mertens & Co., and J. M. Mertens, individually for the sum of six hundred and twelve and 3/100 ($612.03) dollars. That the said Varick Bank of New York duly discounted the said promissory note in writing for a valuable consideration, and before maturity, thereby becoming the lawful owner and holder thereof, and that the said Varick Bank of New York is still the owner and holder thereof.

That no part of said debt has been paid; that there are no offsets or counterclaims to the same, except the sum of six thousand ($6,000) dollars, held by the said Varick Bank of New York, on deposit and as collateral security at the time of the filing of the petition herein. That at the time of the filing of the petition in bankruptcy herein, the Varick Bank of New York also held as collateral security, to wit: A certain policy of insurance upon the life of Jacob M. Mertens, in the Equitable Life Assurance Society of the United States, Numbered 417171 for the sum of fifty thousand ($50,000) dollars, and a certain other insurance policy upon the life of Jacob M. Mertens in the said Equitable Life Assurance Society of the United States, Numbered 252314, for the sum of ten thousand ($10,000) dollars.

That under and by virtue of the terms of the agreement under which the said policies were deposited as collateral with the said Bank, the said Bank was authorized and empowered by the said bankrupt, upon default in the payment of the said debt or any part thereof, to sell, assign or otherwise dispose of the said collateral security at public or private sale, with or without notice to the said bankrupt as is more particularly specified in the said agreement.

That in accordance with the said agreement as aforesaid,

111 the said Varick Bank of New York did, prior to the date of the adjudication herein and subsequent to the date of the filing of the petition, convert the said policies into money in accordance with the terms of the agreement under which the same were deposited, realizing therefore the sum of ten thousand two hundred and twenty-one ($10,221.) dollars, leaving due and owing to the said Varick Bank of New York the sum of nine thousand one hundred and eighteen and 37/100 ($9,118.37) dollars from the said Jacob M. Mertens and upon which said indebtedness no judgment has been rendered.

ADDISON H. DAY, [SEAL.]
*Cashier of Varick Bank of New York.*

Subscribed and sworn to before me this 30th day of November, 1904.

[SEAL.] HENRY J. DORGELOH,
*Notary Public, Kings Co.*

6. Thereafter the trustee filed objections to said proofs of claim, alleging in effect that the sale of said policies was illegal; that the value of the securities held by the claimant had not been ascertained, as required by the Bankruptcy Act; and that the policies were still held by the Varick Bank as collateral to said indebtedness, the trustee still owing the equity.

7. The hearing on the said claims and objections thereupon came on before the referee in bankruptcy, and the following facts were conceded:

First. It is mutually conceded by the respective parties that prior to or on the 14th day of September, 1903, the Varick Bank gave to its attorneys, Messrs. Fried & Czaki, policies Nos. 417171 and 252314, issued by the Equitable Life Assurance Society upon the life of Jacob M. Mertens.

Second. Likewise conceded, that prior to or on the 14th day of September, 1903, and prior to or on the 14th day of September, 1903, and prior to the sale thereof, Frederick M. Czaki handed said policies to one Samuel Goldsticker, duly licensed auctioneer, with instructions to sell the same at public auction at the New York Real Estate Sales Rooms, in the City of New York, Borough of Manhattan, and that on the said 14th day of September, 1903, at 2 P. M. thereof, the said policies were offered for sale at said New York State Real Estate Sales Rooms to the highest bidder
112 by said Samuel Goldsticker, auctioneer.

Third. That no notice of said sale was given to anyone, except said Varick Bank.

Fourth. That on said 14th day of September, 1903, at 2 P. M., the said policies were offered for sale by said Samuel Goldsticker, auctioneer. That there was only one bid made which was for the sum of $10,250, made by said Czaki, and which bid was made in the name of Herbert M. Delanoie, who was not present at said sale; said policies were sold separately, policy No. 417171 was sold for the sum of $7,000 and policy No. 252314 was sold for the sum of $3250.

Fifth. That said Varick Bank of New York had instructed said Czaki that should he purchase said policies to do so in the name of said Delanoie.

Sixth. That said Varick Bank of New York prior to said sale made its check on the Western National Bank to its own order for the amount as therein stated, which said check said Varick Bank's cashier cashed in bills, which bills were thereupon handed to said Czaki. (Said check was dated September 14, 1903, and was for the amount of $10,279.)

Seventh. That said Czaki gave said money to said auctioneer after the sale of the said policies and that the auctioneer's fees were $29.

Eighth. That after said sale the said auctioneer gave said Czaki his certified check for $10250 to the order of the Varick Bank, which check was delivered to the said Bank by said Czaki.

Ninth. That the papers marked, Exhibits A, B, C and D, are copies of the originals and are received in evidence with the same force and effect as though originals, said Exhibits being the bills of sale executed, respectively, by the Varick Bank of New York and Samuel Goldsticker, auctioneer, upon the sale of the said policies.

Tenth. That on September 17th or thereabouts, said Herbert M. Delanoie received said assignments and policies and obtained a loan thereon from the Knickerbocker Trust Company of $10250
113 which amount on that day said Delanoie delivered to the Varick Bank.

Eleventh. That said policies were bid in for said Varick Bank at said sale and that whatever title was acquired at said sale by said Delanoie was taken for it and that said Delanoie ever since has and still holds said policies for said Varick Bank subject to the rights of the Knickerbocker Trust Company therein to the extent of said loan for $10250 and the further sum of $2622.75 since loaned thereon with interest.

Twelfth. Likewise conceded that Exhibits E and F are copies of assignments relating to said policies which were delivered to said Bank at or about the times of their respective dates which copies may be received in evidence with the same force and effect as the originals thereof, being assignments on the blank forms furnished by the Equitable Life Assurance Society. (Exhibit E is an assignment as collateral security of Policy No. 417171 made to the Varick Bank by Jacob M. Mertens, dated March 21, 1901, and a receipt for said policies signed by said Varick Bank. Exhibit F is an assignment of policy No. 252314, as collateral security made to the Varick Bank of New York by Jennie Mertens and Jacob M. Mertens and dated March 25, 1901. Said policies are the same policies hereinbefore referred to).

Thirteenth. That during the years 1901 and a portion of 1902 J. Maus Schemerhorn was the President of the Varick Bank of New York and he was immediately succeeded by John T. Sproull, as President of said Bank. There has since been no other president.

Fourteenth. That on August 19, 1903, said Varick Bank had actual notice that a receiver in bankruptcy of J. M. Mertens & Company and of its individual members had been appointed.

Fifteenth. That Exhibits G and H, offered in evidence and received, are correct copies of the originals and are received with the same force and effect as though originals, being policies No. 417171, Exhibit G, and policy No. 252314, Exhibit H.

Sixteenth. That Exhibit I is a correct copy of an assign-
114 ment of policy No. 252314, to said Varick Bank executed by Jennie Mertens and others, being all the beneficiaries in said policies which was delivered to said bank at or about the time of its date and is received in evidence. (Said assignment is made as collateral security for all loans and monies advanced and to be advanced by the bank for the firm of Jacob M. Mertens & Co. and is executed by the wife and all of the children of said Jacob M. Mertens, and is dated March 16, 1901.)

8. Thereupon the following took place:

Mr. CZAKI: I ask the Court to allow the claims of the Varick Bank of New York as filed upon the records and documents in evidence.

Mr. CROWLEY: I move for the disallowance of both of the claims on the ground that the claims have not been properly proved; that the value of the securities set forth in the claims has not been proved and no evidence from which that value can be ascertained and found by the Court has been given so as to establish the balance.

Mr. CZAKI: The attorney for the creditors requests to know of the attorney for the trustee whether he rests his case under the objections as filed.

Mr. CZAKI: I move that the referee decide that the burden of proof in the proceedings is upon the trustee, not having received any response to my question as to whether he had rested.

The REFEREE: I think that the transaction of September 14th, through the auctioneer, consummated in the bills of sale referred to in the ninth concession, under all the concessions made, was not such a sale of the insurance policies of either of them, as would have barred the right of the bankrupt under the assignments of the policies, Exhibits E & F, read in connection with the agreements made upon the notes, the contents of which are shown in the proofs of claim, to redeem the same upon payment of his indebtedness secured thereby. I do not think the sale was a public sale in any fair interpretation — that phase. It appears that the policicies are still held for the Varick Bank, and the transaction appears to me upon all the concessions here, to have no more significance than it would have had the Varick Bank, in form and with knowledge of the fact that bankruptcy proceedings were pending against its creditor, in which a received had been appointed, executed to itself, an absolute assignment of title to the policies. The trustee insists that the policies and each of them have in fact a larger commercial value than the amount proposed to be credited by the Varick Bank upon its claim secured thereby. Such a claim appears to be justified by the terms of the policies themselves. Whatever may be true with respect to the right of the bankrupt or of the trustee to redeem the policies, and whether or not any such right exists, need not be now determined. The creditor, the Varick Bank, is now in this Court still holding these policies, acquired in connection with certain loans, and seeking the aid of this Court in the collection of the balance of its claims which shall not be paid in full out of these policies. Before the creditor is entitled to that relief from this Court, it should satisfy this Court that the full value of the security held by it has been credited or will be, upon the total amount of its claims to which the same applies. I am not satisfied that such full value has been applied by or through the transaction shown as the disposition of the policies in form of a sale, to Mr. Delanoie. As the claim against the co-partnership include the notes set out in the claim against J. M. Mertens individually, I will reserve the question as to the allowance against the co-partnership for a subsequent determination.

As the proof now stands, I shall, therefore, decline to allow either claim as established against the estate or estates. The claimant may, however, if it so wishes, offer further evidence with a view of estab-

lishing the value of the pol-cies referred to which should be credited or allowed upon its claims against the bankrupt estates.

Mr. CZAKI: Then, as I understand it, we have the right to introduce further evidence upon either of these claim- if we so de-
116 sire, and that your Honor's decision is without prejudice to that right?

The REFEREE: Yes, you may proceed with any further evidence upon the subject, without prejudice to your right to review this decision as a preliminary question.

9. Thereupon the trustee asked the Court under Subdivision *h* of Section 57 of the Bankruptcy Act to direct a resale of the policies upon notice to the trustee, to which the claimant objected as not being authorized by the Bankruptcy Act or Practice. Subsequently the Referee granted such motion.

10. The claimant thereupon filed its petition to have the question certified to be reviewed by the District Judge, who on January 21, 1905, made an order affirming the ruling of the Referee without prejudice to the right of the Varick Bank to introduce further evidence as it might be advised. Said District Court held that the Bankruptcy Act and the filing of a petition in bankruptcy under the same operated as an injunction and prohibited the sale pending the adjudication and further that said sale as conducted was fraudulent. From that order an appeal was duly taken by the claimant to this Circuit Court of Appeals.

This Court finds as matters of law.

1. That the order made by the referee and by the District Court was a rejection of the claims of the Varick Bank.

2. That the policies in question did not belong to the partnership estate, and that the claim against the partnership should have been allowed in full.

3. That the sale of the policies under the facts as stipulated was a good and valid sale and passed a good and valid title to said policies to the Varick Bank.

4. That the value of said policies was properly liquidated by said sale under the terms of Section 57-*h* of the Bankruptcy Act and that under said Section the referee had no power to make the order
117 directing a resale thereof.

5. That said Bankruptcy Act did not suspend or enjoin the exercise of said power of sale during the time between the filing of the petition and the adjudication in bankruptcy.

6. That the claim against the individual estate of Jacob M. Mertens should be allowed in full.

7. That the burden of proving that said sale was unfair was upon the trustee.

That a decree in accordance with the above findings be made and entered and a mandate with instructions in accordance therewith be issued by the Clerk of this Court.

Dated this 22d day of March, 1906.

WM. J. WALLACE,
E. HENRY LACOMBE,
*Judges Circuit Court of Appeals.*

118 [Endorsed:] United States Circuit Court of Appeals, Second District. In the matter of Jacob M. Mertens *et al.*, Bankrupts, The Varick Bank of New York, Appellant. Findings of Fact and Law. Lewis & Crowley, Attorneys for Trustee. Office and Post Office Address, 20 White Memorial Building, Syracuse, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 22, 1906. William Parkin, Clerk.

119 United States Circuit Court of Appeals, for the Second Circuit.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts; ALBERT K. HISCOCK, Trustee in Bankruptcy, Appellant, THE VARICK BANK OF NEW YORK, Appellee.

The above mentioned appellant respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals, for the Second Circuit, and that a judgment and decree has therein been rendered which was entered on the 4th day of March, 1906, and which reversed the decree of the District Court of the United States for the Northern District of New York, and that the claims against said bankrupt estates which are allowed by said judgment exceed in amount the sum of two thousand dollars each besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Second Circuit has final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, your appellant prays that an appeal may be allowed him in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said appellant, may be reviewed, and if error be found, corrected according to the laws of the United States and the customs thereof.

WILL B. CROWLEY,
*Attorney for Appellant.*

120 It is hereby ordered that the appeal in the foregoing petition mentioned, to the Supreme Court of the United States, be and it is hereby allowed as prayed.

WM. J. WALLACE,
*U. S. Circuit Judge, Second Circuit.*

March 22, 1906.

121 [Endorsed:] United States Circuit Court of Appeals: Second Circuit. In the Matter of Jacob M. Mertens *et al.*, Bankrupts, Albert K. Hiscock, Trustee in Bankruptcy, Appellant, The Varick Bank of New York, Appellee. Petition for Appeal and allowance thereof. Will B. Crowley, Attorney for Appellant. Office

and Post Office Address, 20 White Memorial Building, Syracuse, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 23, 1906. William Parkin, Clerk.

122 United States Circuit Court of Appeals, Second Circuit.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually, and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts; ALBERT K. HISCOCK, Trustee in Bankruptcy, Appellant; THE VARICK BANK OF NEW YORK, Appellee.

The appellant in the above entitled cause, in connection with his petition for appeal herein, presents and files therewith the following for his assignment of errors as to which he alleges that the decree entered herein on the 4th day of March, 1906, is erroneous, to wit:

1. In holding that the order made by the referee in bankruptcy and by the District Court was a rejection of the claims of the Varick Bank.

2. In holding that the policies in question did not belong to the partnership estate, but did belong to the estate of Jacob M. Mertens, individually, and that the claim against the partnership should be allowed in full.

3. In holding that the alleged sale of the policies was a good and valid sale and passed a good and valid title thereto to the Varick Bank.

4. In holding that the value of said policies was properly liquidated under the terms of Section 57-*h* of the Bankruptcy Act, and in holding that the referee had no power to make the order directing a re-sale thereof.

5. In refusing to hold that said securities could not be sold or liquidated except pursuant to an order of the Court of bankruptcy.

6. In holding that the Bankruptcy Act did not suspend and enjoin the exercise of the power of sale contained in appel-
123 lant's notes during the interim between the filing of the petitio- and the adjudication in bankruptcy and in refusing to hold that any sale during that period was void.

7. In holding that the claim against the individual estate of Jacob M. Mertens should be allowed in full.

8. In holding that the burden of proving that the sale of said policies was unfair was upon the trustee.

9. In refusing to hold that it was within the discretion of the referee under Section 57-*d* of the Bankruptcy Act to refuse to allow said claims on the evidence presented, and to suspend the allowance of the partnership claim until the said securities had been properly liquidated.

10. In holding that there was no evidence that the policies in question had a larger value than that which was obtained on said sale therefor.

11. In reversing the decree of the Court below.

Wherefore, the appellant prays for an examination and correction of the errors assigned and for a judgment and decree reversing in all things the said judgment and decree of the Court of Appeals for the Second Circuit.

WILL B. CROWLEY,
*Attorney for Appellant.*

124 Endorsed: United States Circuit Court of Appeals: Second Circuit. In the Matter of Jacob M. Mertens, *et al.*, Bankrupts, Albert K. Hiscock, Trustee in Bankruptcy, Appellant, The Varick Bank of New York, Appellee. Assignment of Errors. Will B. Crowley, Attorney for Appellant. Office and post office address, 20 White Memorial Building, Syracuse, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 23, 1906. William Parkin, Clerk.

125 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 124 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Matter of Jacob M. Mertens *et al.*, Bankrupts, Varick Bank of New York, Appellants, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 26th day of March, in the year of our Lord One Thousand Nine Hundred and Six and of the Independence of the said United States the One Hundred and Thirtieth.

[Seal United States Circuit Court of Appeals.]

WM. PARKIN, *Clerk.*

126 United States Circuit Court of Appeals, Second Circuit.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually, and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts; ALBERT K. HISCOCK, Trustee in Bankruptcy, Appellant; THE VARICK BANK OF NEW YORK, Appellee.

To The Varick Bank of New York:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit,

wherein said Albert K. Hiscock, as trustee in bankruptcy, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable William L. Wallace, Judge of the United States Circuit Court of Appeals for the Second Circuit, this 22nd day of March, 1906.

WM. J. WALLACE,
*Judge of the United States Circuit Court of Appeals, Second Circuit.*

Personal service of a copy of this citation is hereby admitted. Dated, March 24th, 1906.

FRIED AND CZAKI,
*Solicitors for The Varick Bank of New York, Appellee.*

127 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Jacob M. Mertens, *et al.*, Bankrupts, Albert K. Hiscock, Trustee in Bankruptcy, Appellant, The Varick Bank of New York, Appellee. Citation. Will B. Crowley, Attorney for Appellant. Office and post office address, 20 White Memorial Building, Syracuse, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 26, 1906. William Parkin, Clerk.

Endorsed on cover: File No. 20,167. U. S. circuit court appeals, 2d circuit. Term No. 244. Albert K. Hiscock, trustee in bankruptcy of Jacob M. Mertens *et al.*, bankrupts, appellant, *vs.* The Varick Bank of New York. Filed April 2d, 1906. File No. 20,167.